United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL APPENDIX

77-7145

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7145

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs-Appellees,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
APR 21 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

On Appeal From an Order of the
United States District Court
for the Southern District of New York

SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLEES

VOLUME I

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77 APR 19 P 3:57

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

VOLUME I

	Page
Exhibits to Crowley Affidavit in Support of Plaintiffs' Order to Show Cause (Not Included in Appendix submitted by Appellants)	
Exhibit B - Endorsement, 72 Civ. 928	1sa
Exhibit C - Guardians Association, et al. v. Civil Service Commission, et al., DKT. No. 73-2083	2sa
Exhibit D - Order to Show Cause on a Motion for Expedited Discovery	12sa
Exhibit E - Letter of Ryan, J. to Kenneth Kimerling dated March 25, 1976	83sa
Exhibit G - Letter of Christopher Crowley to Ryan, J. dated April 8, 1976	84sa
Exhibit H - "Police Civil Service Selection Procedures in New York City" (Rand Report)	85sa
Exhibit L - Memorandum from Peter Ring, Special Assistant to Commanding Officer, Personnel Bureau, NYCPD dated March 3, 1972	204sa
Exhibit M - Costa Report, "Fair Employment Law and Minority Recruitment and Promotion"	207sa
Exhibit N - Letter from Marquette University to Benjamin Ward dated August 28, 1972	250sa
Exhibit Q - Report, "Height of American Male Youths of Military Age by Race, Ethnic Group, and Selected Geographic Areas, Fiscal Year 1972"	259sa

Page

Exhibit R - Lavin Statement 280sa

Exhibit S - Letter from John Ronan, NYCPD to Laid-off Police Officers dated April 9, 1976 287sa

Exhibit U - Plaintiffs' Interrogatories and Request to Produce Documents 289sa

VOLUME II

Transcripts of District Court Hearings on Relief

March 21, 1977 293sa

March 23, 1977 322sa

March 28, 1977 353sa

Plaintiffs' Proposed Orders for Relief

Proposed Order Submitted March 18, 1977 555sa

Proposed Order Submitted March 21, 1977 560sa

Proposed Order Submitted March 28, 1977 566sa

Plaintiffs' Affidavit in Opposition to Defendants' Motion to Stay 581sa

Order of this Court Granting Stay 586sa

THE GUARDIAN ASSOCIATION OF THE POLICE DEPARTMENT, INC., et al. v. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.

Endorsement
72 Civ. 928

This motion for injunctive relief pendente lite is made some months after the filing of the complaint.

It is not in dispute that, of the City's approximately 29,500 police officers, 7 percent are black and 2 percent are of Puerto Rican or Hispanic origin.

I assume for the purpose of this motion that plaintiffs have made a prima facie showing of discrimination based on examination scores alone. There remains a factual issue as to the job-relatedness of the challenged examinations. The burden of establishing this issue of job-relatedness rests with the defendants. This is a factual issue to be resolved at trial and summary judgment cannot be granted [Chance v. Board of Examiners, 458 F.2d, 1167, 1175 (2d Cir., 1972)].

It affirmatively appears that all on existing lists, including minorities, will be appointed at the latest by early fall of 1973, and at that time, the existing lists will be depleted. The Police Commissioner's emergency schedule of appointments should not be halted or interrupted. It is the City's initial goal to appoint 3,150 new police men in the present fiscal year; 1750 remain to be recruited and the existing list of eligibles is down to about 2,000, of whom less than 1,000 may still be available, the rest having moved or taken other jobs.

The extreme emergency need for appointments to patrolman and for promotions to supervising officers in the Police Department is a matter of common knowledge and of grave public concern. The defendants are striving to meet this demand and, at the same time, set up new tests which would incorporate equal-employment requirements for minority applicants and meet E.E.O.C. Guidelines.

Affirmative steps are being taken by the City to meet the plaintiffs' objections to current examinations methods and to meet plaintiff's objection that present examinations have an asserted built-in bias which has kept qualified minority group applicants out of the Police Department for reasons unrelated to job performance. To the end that the future examinations be fair to all, the City has but recently made a contract with the Psychological Corporation of Manhattan to prepare new tests to be held before January 1, 1974.

When these new tests are promulgated, opportunity will be afforded plaintiffs to assert any objection they may have. There is clearly no basis for injunctive relief at this time.

The foregoing states my findings of fact and conclusion of law.

Motion is denied; so ordered.

Dated: July 12th, 1973.

Sylvester J. Ryan /s/
U.S.D.J.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 241 - September Term, 1973

Argued September 14, 1973 Decided November 21, 1973

Docket No. 73-2083

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.,

Plaintiffs-Appellants,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellees,

-and-

PATROLMEN"S BENEVOLENT ASSOCIATION, et al.,

Intervenor-Defendants-Appellees.

Before LUMBARD, FRIENDLY and FEINBERG, Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Sylvester J. Ryan, Judge, denying a preliminary injunction in a civil rights action by minority groups challenging the examination procedures for entrance to the New York City police force. Affirmed, with instructions.

Christopher Crowley, Esq., New York, N. Y. (Jack Greenberg, Esq., Elizabeth B. DuBois, Esq., New York, N. Y., Kenneth Kimerling, Esq., of Counsel), for Plaintiffs-Appellants

EXHIBIT C

FPI-Randstone
3-19-73—10M—1038

Paula J. Omansky, Esq., New York, New York (Norman Redlich, Corporation Counsel, City of New York, and Frances E. Loren, Esq., of Counsel) for Defendants-Appellees.

Phillips, Nizer, Benjamin, Krim & Ballon, Esqs., New York, N. Y. (Stuart Linnick, Esq., of Counsel), and Kaye, Scholer, Fierman, Hays & Handler, Esqs., New York, N.Y. (Seymour Goldstein, Esq., of Counsel), for Intervenors-Defendants-Appellees.

FPI-Manhattan
3-19-73—1001M—1006

FRIENDLY, Circuit Judge:

Like Vulcan Society v. Civil Service Comm'n, this day decided, this action was brought in the District Court for the Southern District of New York under the Civil Rights Act, 42 U.S.C. § 1983 and its jurisdictional implementation, 28 U.S.C. § 1343(3). Plaintiffs here are two organizations representing black and Hispanic members of the New York City Police Department, several minority policemen who have unsuccessfully sought promotion, and several minority applicants who have been denied appointment to the force. The defendants are the Civil Service Commission of the City of New York, the City's Department of Personnel, the Police Department, individual civil service commissioners, and former Police Commissioner Murphy, hereafter referred to as the municipal defendants. Three police benevolent associations and various non-minority individuals awaiting promotion or appointment to the Department were permitted to intervene on the side of defendants. As in Vulcan Society, plaintiffs alleged that existing entry level and promotional examinations had a racially disproportionate impact, were improperly prepared, and were not job-related.

When the action was commenced on March 3, 1972, New York City was not hiring new policemen nor planning any new examinations. Since there appeared to be no urgency, it was agreed that the City would have the New York City Rand Institute (Rand) conduct a survey of the two most recent entry examinations, the second of which was held in 1970, to

FPI-Headquarters
3-19-73—100M—1308

determine their racial impact. This agreement was conditioned on plaintiffs' undertaking not to seek injunctive relief while the Rand study was underway and the job freeze remained in effect. In January 1973 the freeze was lifted, and the City resumed hiring policemen from the eligibility lists; interim results of the Rand survey became available shortly thereafter. At about the same time, the City announced plans for a new patrolman's examination, to be given before January 1, 1974.

Late in March, plaintiffs moved for a preliminary injunction against continued appointments from current eligibility lists and against the use of inadequate methods to prepare any future examinations. Before decision, the final version of the Rand Report became available and was submitted to the district court. The Report confirmed plaintiffs' contention that the entry examinations had had a racially disproportionate impact. Plaintiffs also submitted affidavits and the results of discovery tending to show that the past examinations were not job-related and that the new one might not cure the defects.

As to the past examinations, the municipal defendants did not answer on the merits, but argued that the eligibility lists from those tests would soon be exhausted and that the public interest required that new policemen continue to be appointed. As to the new examination, the defendants alleged that it would be prepared in compliance with the requirements of Title VII of the Civil Rights Act of 1964, 42

U.S.C. §§ 2000e - 2000e-17, now applicable to municipalities by virtue of 86 Stat. 103 (1972), and in accordance with the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 - 1607.14.[1]

On July 16, 1973, Judge Ryan denied the motion for a temporary injunction in a short opinion. He assumed that plaintiffs had made the showing of racially disproportionate impact needed to put upon the municipal defendants the burden of establishing the job-relatedness of the past examinations. Despite the defendants' failure to present any evidence on the subject, he thought that resolution of this factual issue should await trial on the merits.[2] What was decisive for him was that "It affirmatively appears that all on existing lists, including minorities, will be appointed at the latest by early fall of 1973, and at that time, the existing lists will be depleted." Judge Ryan also denied the plaintiffs' request for injunctive relief as to future examinations, finding that in view of the City's efforts to cure the alleged flaws in its past tests, there was "clearly no basis for injunctive relief at this time."

Plaintiffs promptly appealed. They sought from a judge of this court an injunction pending appeal and an expedited appeal. The former request was denied; the latter granted. We heard the appeal on September 14, 1973, but, because of its close relationship with that in Vulcan Society, determined to consider and decide the two cases together.

Defendants' argument that a preliminary injunction cannot be issued because they have not yet had an evidentiary hearing on the merits is misconceived. Although normally a court should hold some form of evidentiary hearing prior to issuing a preliminary injunction when there is a dispute concerning the facts, see SEC v. Frank, 388 F.2d 486, 490-93 (2 Cir. 1968); 7 Moore, Federal Practice ¶ 65.04[3], a defendant cannot block issuance of an injunction simply by refusing to submit evidence on contested fact issues. To be sure, very little may suffice; an affidavit of a competent expert would ordinarily be enough to call for an evidentiary hearing, such as Judge Weinfeld conducted in Vulcan Society, even on an application for interlocutory relief. See Ceruti, Inc. v. McCrory Corp., 438 F.2d 281, 284 (2 Cir. 1971); Carter-Wallace Pharmacal Co. v. Davis-Edwards Pharmacal Co., 443 F.2d 867, 872 n.5 (2 Cir. 1971). But here there was none.

Although we reject this basis for denying relief, we affirm the order of the district court on a different ground. Judge Ryan was confronted with a condition, not a theory. In contrast to Vulcan Society, where many blacks and Hispanics who passed the examination might be denied appointment because of their low grades in the absence of interim relief, here it appeared that all who passed the examinations were assured of rather speedy appointment. There would have been little use in the court's devoting days of much needed time to umpiring a battle of experts concerning the job-relatedness of examinations whose lists were expected to be approaching exhaustion.

An affidavit by Police Commissioner Cawley submitted in response to a request made by us at oral argument shows that the judge's expectations were well-founded. Existing lists will have been exhausted before this opinion is filed. Although a new examination will be held on December 15, 1973, the earliest possible date of appointments therefrom is June 1974. Meanwhile the only available sources of new policemen will be lists of the New York City Transit Authority and the New York City Housing Authority police, which the Civil Service Commission has made available, and even these may not be adequate. While the affidavit does not disclose the ethnic composition of the eligibles remaining on these lists, it appears that 59% of the "protective service workers" employed by the Housing Authority and 27% of the Transit Authority patrolmen are blacks or Hispanics. In view of all this we cannot say that the refusal to grant a temporary injunction against appointments from the old examination lists was an abuse of discretion.

The remaining issue is whether the court erred in not making directions with respect to the new examination. The affidavit of plaintiffs' expert alleged that defendants' admissions in discovery showed that they had not made proper job evaluations for the new examinations; that the new examination was being prepared on the basis of "rational validation" rather than predictive or concurrent validation;[3] and that the former is not acceptable under the EEOC Guidelines. The court dismissed this by saying that "When these

new tests are promulgated, opportunity will be afforded plaintiffs to assert any objection they have." Plaintiffs counter that it would be better to settle such matters before rather than after. Sharing the views expressed by Judge Coffin on a similar problem in Castro v. Beecher, 459 F.2d 726, 737-38 (1 Cir. 1972), we think the district court would have done well to direct that the municipal defendants should disclose the proposed examination to plaintiffs' counsel and expert, under an appropriate protective order, and afford them an opportunity to advance constructive criticisms, which the defendants should have carefully considered, without obligation to accept. We made that suggestion at argument. Although the time may now be too late, we think it desirable to instruct the district court to make such a direction now.

The order is affirmed with the instructions indicated above. The mandate shall issue forthwith. No costs.

FPI-Rockefeller
3-19-73—10:34

1. In Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), the Supreme Court noted that the EEOC's Guidelines interpreting the Act according to the mandate of 42 U.S.C. § 2000e-12(a) were "entitled to great deference." However, Griggs does not require "compliance by every employer with each technical form of validation procedure set out in [the Guidelines]." United States v. Georgia Power Co., 474 F.2d 906, 913 (5 Cir. 1973). If the EEOC's interpretations go beyond congressional intent, the Guidelines must give way. See Espinoza v. Farah Manufacturing Co., 42 U.S.L.W. ____, ____ (U.S. Nov. 19, 1973).

2. Although plaintiffs had not requested it, the district court commented that summary judgment would not be proper without an evidentiary hearing. As a matter of principle, we cannot approve the intimation that under F.R.Civ.P. 56(e) defendants who are required to sustain the job-relatedness of examinations but fail to present any justifying material are nevertheless entitled to a trial. See Dressler v. MV Sandpiper, 331 F.2d 130 (2 Cir. 1964); 6 Moore, Federal Practice ¶ 56.22[2] (1972).

3. As to this, see our opinion in Vulcan Society v. Civil Service Comm'n, slip opinions _____, _____.

Plaintiffs' attack on the defendants' proposed validation method provides a perfect illustration of the

FPI-Sandstone
3-19-73—10:51—1003

pitfalls of judicial embroilment in the nomenclature of employment testing. The plaintiffs place great weight on their claim that "rational validation" is not among the methods of validation that enjoy professional acceptability. Yet it appears that at least among some experts "rational validation" is a generic term for "content" and "construct" validation, methods that are expressly approved in the EEOC Guidelines when establishing criterion-related validity through predictive or concurrent validation is not feasible. 29 C.F.R. § 1607.5(a). See Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum. L. Rev. 900, 913 (1972). See also Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1121-22 (1971); Johnson, A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts, 58 Va. L. Rev. 844, 858-64 (1972).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al., Plaintiffs,	72 Civ. 928 (S.J.R.)
-against-	ORDER TO SHOW CAUSE ON A MOTION FOR EXPEDITED DISCOVERY
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al., Defendants.	

Upon the annexed affidavit of Kenneth Kimerling, and upon all prior papers and proceedings had herein,

IT IS ORDERED, that the defendants show cause to this Court in the United States Courthouse, Foley Square, New York, New York in Room ___ on the _____day of March, 1976 at o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an order should not be made hrein pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure for leave to request answers to interrogatories and the production of documents for inspection and copying within one week of the date of that order.

IT IS FURTHER ORDERED, that service of a copy of this order and of the papers upon which the same is granted, on the counsel for defendants herein, on or before March ___ ,1976, at ___ A.M./P.M. o'clock shall be sufficient service of this order.

Dated: New York, New York
March 1976

U.S.D.J.

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.,	Civil Action No. 72 Civ. 928 (S.J.R.)
Plaintiffs	
-against-	AFFIDAVIT
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,	
Defendants.	

KENNETH KIMERLING, being duly sworn deposes and says:

1. I am an attorney for plaintiffs and submit this affidavit in support of Plaintiffs' Motion for Expedited Discovery. The data requested by plaintiffs is needed to support a motion for preliminary injunction to filed shortly.

PRIOR PROCEEDINGS

2. The complaint in this case was filed on March 3, 1972 and alleged a pattern and practice of employment discrimination against Blacks and Hispanics (hereinafter Minorities) by the New York City Police Department and the Civil Service Commission and their officials. The gravamen of the complaint was that the selection process for becoming New York

City Police Department (hereinafter N.Y.C.P.D.) patrolmen and New York City Police Department officers discriminated against Minorities without any job-related necessity.

3. Plaintiffs' original motion for preliminary injunction was denied by this Court on July 16, 1973. While the Court assumed that the plaintiffs' had made a prima facie showing of discrimination, it was determined that injunction relief would not issue because this eligibility lists for appointment would be exhausted.

4. The Court of Appeals, affirmed, finding:

> "In contrast to Vulcan Society [v. Civil Service Commission, 400 F.2d 387 (2nd Cir. 1973)] when many Blacks and Hispanics who passed the examination might be denied appointment because of their low grades in the absence of interim relief, here it appeared that all who passed the examinations were assured of rather speedy appointment. There would have been little use in the Court's devoting days of experts concerning the job relatedness of examinations whose lists were expected to be approaching exhaustion."

Guardians Association v. Civil Service Commission, 400 F.2d 400,404 (2d Cir. 1973)

LAY-OFFS

5. However, since the time of the Second Circuit opinion, the situation has reversed itself. Those Minorities who were appointed as a result of the exhaustion of the eligibility lists are now laid-off, and the irreparable injury which was not apparent to the courts in 1973 is apparent now. Since June 30, 1975, approximately 5,000 New York City Police Department patrolmen have been laid-off. After some recall there remains

about 3,000 patrolmen out of work. Because of discriminatory hiring practices of defendants, Minorities are the last hired, ranking low down in the eligibility lists and, therefore, the first fired. Minorities bear the isproportionate burden of these lay-offs.

6. The Second Circuit Court of Appeals has recently addressed this very same issue in Acha v. Beame, (Docket No. 75-7388, February 19, 1976) (A copy of the opinion is attached).There women police officers complained of the discriminatory hiring practices of defendants, herein, which restricted their ability to be appointed to the New York City Police Department. In 1973, the Department revised its policy and allowed women to compete equally with men for police jobs. However, as with Minorities, the effects of the past discrimination were perpetuated on those hired after 1973. Because of their low seniority these women police officers were among the first laid-off in June, 1975. The Court of Appeals remanded the case to the District Court to determine who among the women police officers would have been hired early enough to accumulate sufficient seniority to withstand the lay-offs were it not for defendants' discrimination and provide these women with a "constructive seniority" to remedy these past discriminations.

7. The court in Acha relied heavily on another recent Second Circuit opinion Chance v. Board of Examiners (75-7161, 75-7164 January 19, 1976) (A copy of that opinion is attached). Chance involved discrimination in examinations for supervisory positions in the New York City school system. After successfully obtaining relief, many Minorities were appointed to positions. However, that relief was similarly being evicervated

by the lay-offs or excessing of personnel. While the Second Circuit reversed an order requiring that personnel be excessed in proportion to the racial and ethnic make-up of the persons holding supervisory positions, it did reccommend a settlement which would "accord constructive seniority to any minority supervision who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination" (Majority opinion at 8).

NEED FOR DISCOVERY

8. Plaintiffs, in the instant matter, intend to move for similar injunctive relief as ordered in Acha. In doing so, plaintiffs will need the data indicated in the discovery demand to effectively prosecute the matter. (Discovery Demand Attached) This information is under the exclusive control of defendants and readily retrievable by them. The answers to interrogatories requesting ethnic and racial break downs of seniority and recall lists are, on information and belief, computarized and can be obtained with little difficulty or delay. The other interrogatories and document demands are similarly easily answered or produced.

9. The reason for the need for expedited treatment is because 1) on information and belief, defendants are about to recall several hundred police officers pursuant to a federal grant for that purpose, and 2) so that, the restructuring of the seniority of Minorities, foreseen in this case, can be coordinated with the restructuring of seniority of women in Acha.

10. I have unsuccessfully requested from Corporation

Counsel that this data be provided without Court order.

11. In light of merits of plaintiffs' claims and the relevance of the discovery requested, and in light of the need for expedited treatment, plaintiffs respectfully request that an order issue requiring that the discovery be provided within one week of the date of the order.

12. No prior application has been made for the relief requested herein.

Kenneth Kimerling

KENNETH KIMERLING

Sworn to before me this
24th day of March, 1976

Ruth Franco

NOTARY PUBLIC

RUTH FRANCO
Notary Public, State of New York
No. 03-4510591
Qualified in Bronx County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 397—September Term, 1975.

(Argued December 5, 1975 Decided February 19, 1976.)

Docket No. 75-7388

BERALDINE L. ACHA and ABLENE M. EGAN, each individually and on behalf of all others similarly situated,

Appellants,

—against—

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer,

Appellees.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from dismissal by United States District Court for the Southern District of New York, Kevin T. Duffy, *J.*, of employment discrimination suit challenging layoffs under seniority system of female police officers.

Reversed and remanded.

MURRAY A. GORDON, New York, N.Y., *for Appellants.*

LEONARD KOERNER, New York, N.Y. (W. Bernard Richland, Corporation Counsel of the City of New York; L. Kevin Sheridan, Gregory D. Frost, on the brief), *for Appellees.*

LUTZ ALEXANDER PRAGER, Attorney, Equal Employment Opportunity Commission, Washington, D.C. (Abner W. Sibal, General Counsel; Joseph T. Eddins, Associate General Counsel; Beatrice Rosenberg and Charles L. Reischel, Attorneys, on the brief), *as Amicus Curiae.*

FEINBERG, *Circuit Judge:*

This class action by two former female police officers of the New York City Police Department raises important questions as to the effect of a facially neutral seniority system on enforcement of the national policy against sex discrimination. Faced with notice of layoff because of New York City's well-publicized fiscal problems, plaintiffs brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and under 42 U.S.C. § 1983 and the fourteenth amendment against the City of New York, its Mayor and its Police Commissioner. The gist of the complaint was that since the threatened layoffs were based on seniority, they were sex-discriminatory because women had been prevented from obtaining the seniority necessary to avoid layoffs by defendants' unlawful discrimination against them in the past. Judge Kevin T. Duffy of the United States District Court for the Southern District of New York denied plaintiffs' motion for a preliminary injunction

and dismissed the complaint; the judge also refused permission to amend the complaint. In their appeal to this court, plaintiffs are supported by the Equal Employment Opportunity Commission as amicus curiae. For reasons set forth below, we reverse the order of the district court and remand for further proceedings.

I

The facts are simple and, for purposes of this appeal, undisputed. Appellants Beraldine L. Acha and Arlene M. Egan represent a class of 371 female officers who were laid off on June 30, 1975. Before 1973, women were hired by the Police Department only for the job title Policewoman, for which there was an official quota amounting to 1.34 per cent of the total number of police officers. At the end of 1972, there were 355 Policewoman positions as compared to more than 26,000 Patrolmen. From 1964 to 1969, only two examinations for Policewoman were given, while many more examinations were offered for men applying to be Patrolmen. From 1969 to 1973, a hiring freeze applied to both Patrolman and Policewoman positions, but men could apparently be promoted to Patrolman from the position of Police Trainee, which was not open to women.

In January 1973, the titles of Patrolman and Policewoman were merged into the title of Police Officer. Men and women appointed thereafter received the same medical examination and the same training. However, appointments were made from separate lists in a ratio of four men to one woman, regardless of their comparable grades on examinations that had been identical, although given separately. Thus, some men were appointed prior to women who had received higher grades. By June 1975, the percentage of female police officers was 2.62 per cent.

On June 30, 1975, New York City laid off 4,000 police officers because of its fiscal crisis. These layoffs were made in accordance with section 80 of the New York Civil Service Law, reproduced in the margin,[1] which provides for the familiar last-hired, first-fired method of layoff. Since so many females had been hired only recently, this system affected them much more than the males. Judge Duffy found that "The layoffs now proposed will reduce the number of females on the police force by 73.5 per cent, while only 23.9 per cent of the males will be discharged."

Plaintiffs' complaint alleges that the facially neutral seniority system of section 80 actually perpetuated the past discriminatory hiring policies of the Police Department. For this reason, the layoffs violated plaintiffs' statutory rights under Title VII and their constitutional rights under the equal protection and due process clauses of the fourteenth amendment. In a brief memorandum opinion, Judge Duffy held, in effect, that defendants could not have acted illegally in following the mandate of section 80, which was a bona fide seniority system. In support of this conclusion, the judge cited two recent circuit court rulings,[2]

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1 Section 80 provides:

> 1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointments on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter [granting special preferences to the blind and veterans] . . . .

2 *Jersey Central Power and Light Co.* v. *Local Union 327*, 508 F.2d 687 (3d Cir. 1975), pets. for cert. filed, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975), 44 U.S.L.W. 3207 (U.S. Sept. 24, 1975), and *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), pet. for cert. filed, 44 U.S.L.W. 3011 (U.S. Apr. 25, 1975).

which relied heavily on the exception in section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), for an employer applying "different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system."[3] The judge also held that granting plaintiffs relief would constitute preferential treatment on the basis of sex, thus violating section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j).[4]

II

Appellants claim that the district court erred in various respects, both procedural and substantive. As to the former, appellants argue that the complaint should not have been dismissed on a motion for a preliminary injunction and that they should have been allowed to amend the complaint to clarify that they were the actual victims of prior discrimination. See *Watkins* v. *United Steel Workers of America, Local 2369,* 516 F.2d 41 (5th Cir. 1975). On the substantive issues, plaintiffs' principal claim is that the grossly disproportionate layoff of women under section 80 violated Title VII, despite section 703(h).

---

3 This section provides:

> Notwithstanding any other provisions of [Title VII], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ., provided that such differences are not the result of an intention to discriminate because of . . . sex . . . .

4 This section provides:

> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the . . . sex . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any . . . sex . . . employed by any employer . . . in comparison with the total number of percentage of persons of such . . . sex . . . in any community . . . .

We turn to the procedural issues first. Judge Duffy dismissed the action on the merits although defendants had made no motion for such relief. Perhaps the judge regarded the hearing before him, at which no evidence was taken, as a consolidation of the hearing on plaintiffs' motion for a preliminary injunction with a trial on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). If so, the failure to give plaintiffs notification of consolidation was improper, *Johnson* v. *White*, slip op. 769, 773 (2d Cir. Nov. 28, 1975), and the error was prejudicial, not harmless. See 7 Moore, Federal Practice ¶ 65.04[4]. Defendants argue that the judge's action was justified because the complaint failed to state a cause of action and could not state one, even if amended, since layoffs under section 80, see note 1 supra, could not be unlawful. To the substantive issues raised by this argument we now turn.

After the job gains by minorities in the decade since enactment of Title VII, the recent downturn in the national economy has produced a disproportionately adverse effect on minority group employment. One significant cause has undoubtedly been the common use of the last-hired, first-fired seniority concept embodied in section 80. In the last few years, there have been many suits challenging use of such seniority systems on the ground that they violated Title VII or the Constitution. Courts have reached conflicting results,[5] and the issue is involved in a case presently

5 See, e.g., *Watkins* v. *United Steel Workers of America, Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), pet. for cert. filed, 43 U.S.L.W. 3594 (U.S. May 6, 1975); *Jersey Central Power and Light Co.* v. *Local Union 327*, supra note 2; *Waters* v. *Wisconsin Steel Works*, supra note 2; *Schaefer* v. *Tannian*, 394 F. Supp. 1136 (E.D. Mich. 1975). See also Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969); Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975) ("Harvard Note").

pending before the Supreme Court. See *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted, 419 U.S. 1050 (1975), argued Nov. 3, 1975, 44 U.S.L.W. 3273. We believe that the proper resolution of the controversy before us is indicated by two prior decisions in this circuit, the latter of which was too recent for Judge Duffy to take into account.

The critical issue in this litigation—and in most of the cases listed in note 5 supra—is whether a facially neutral seniority system used to select the employees laid off is necessarily insulated from attack by section 703(h), quoted in note 3 supra. In *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), we faced the same question in a somewhat different context. In that case, the United States charged that Bethlehem, with the acquiescence of various unions, had discriminated for decades in the hiring and job assignment of blacks at its steel plant in upstate New York. As a result, the comparatively few blacks who were hired were usually shunted off to 11 departments containing the lower-paid and more unpleasant jobs. The seniority system in effect was, for the most part, departmental rather than plant-wide. Transfers were discouraged because a transferring employee lost the seniority and other benefits he had enjoyed in his former department. Bethlehem argued to the district judge that the seniority and transfer provisions were typical of the steel industry, were necessary for safety and efficiency, and had not been instituted or continued for discriminatory reasons. Chief Judge Henderson rejected these contentions, and we affirmed, holding that:

> The pervasiveness and longevity of the overt discriminatory hiring and job assignment practices, admitted by Bethlehem and the unions, compel the conclusion that the present seniority and transfer provisions

> were based on past discriminatory classifications. . . . Accordingly, Chief Judge Henderson's conclusions that the continued use of the seniority and transfer provisions perpetuated discrimination and therefore violated the Act were surely correct.

446 F.2d at 659.

However, although the district judge ordered transfer priority for employees in the 11 segregated departments, he did not grant the Government all the relief it had sought. The judge refused to order that transferees from the 11 departments should lose no pay and should be able to use their plant-wide seniority for all purposes in their new department. On these issues, we reversed the district judge. We specifically rejected the argument that section 703(h) prevented "any alteration of seniority rights." 446 F.2d at 661-62. Among the reasons for our conclusion were that section 703(h) applies by its terms only to a "bona fide" seniority system, which Bethlehem's was not, and that we agreed with Judge Butzner in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968), that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."

Several aspects of the *Bethlehem Steel* decision are significant for this appeal. That the practices under attack were administered through a facially neutral seniority system did not protect the defendants from a finding that Title VII had been violated. Indeed, the operation of that system was altered because of its discriminatory effect. Further, as the EEOC points out in its amicus brief, Bethlehem's seniority list rankings resulted from pre-1965 discrimination that was lawful, however reprehensible it may have been.[6] Nevertheless, we ordered the seniority

6 EEOC brief, 29 n.16.

ranking to be changed, according to plant-wide rather than departmental seniority. Finally, we required Bethlehem and the unions to grant to individual blacks, who had been shown to have suffered discrimination since the date of their hire, greater seniority than they had under the existing rules at the plant.

Having noted all of this, we must immediately state that *Bethlehem Steel* does not directly control this case. The relief sought by appellants here is seniority credit not from the date of their appointment as police officers—they already have that—but from the date they would have been appointed had defendants not discriminated against women. This goes further than the relief ordered by our decision in *Bethlehem Steel*. Indeed, as appellees point out,[7] we took pains in *Bethlehem Steel* to refer to a memorandum of Senators Clark and Case, co-floor managers of the bill which ultimately became Title VII, upon which appellees here rely. We noted:

> That memorandum, however, in focussing on formerly white-only plants, seems to say at most that the seniority of a white on a job will not be affected by the claims of blacks hired after he was. As we make clear below in discussing the precise relief to which we believe the Government is entitled, the discriminatorily assigned employees who transfer will not receive "special seniority rights" or "super-seniority." Their seniority rights will be no greater than that accorded more fortunate employees. Both groups will bid against each other for vacancies on the basis of plant-wide seniority; an earlier-hired white employee will have greater seniority than a later-hired black.

7 Appellees' brief, 19-20.

446 F.2d at 661. Precisely what we did not do in *Bethlehem Steel*, appellees emphasize, is what plaintiffs desire here. That is, if plaintiffs are successful, an "earlier-hired" male employee will not "have greater seniority than a later-hired" female. Appellees are correct that in *Bethlehem Steel* we did not require that "seniority" prior to the date of first hire be recognized. Significantly, in *Bethlehem Steel*, we did not face that issue because the Government, as we also took pains to point out, did not ask us to go that far in remedying the past discrimination. 446 F.2d at 659.

More recently, in *Chance* v. *Board of Examiners* (*Chance IV*), slip op. 6587 (2d Cir. Jan. 19, 1976), we did reach that question. Plaintiffs in that case, which has had a long history in this court, sued under 42 U.S.C. §§ 1981, 1983, not under Title VII. Late in the litigation, the district court had to deal with problems arising out of the need of the New York City Board of Education to lay off some supervisory personnel, euphemistically referred to as "excessing." As the prior *Chance* decisions make clear,[8] many minority group supervisors had been appointed only recently because prior testing procedures had been discriminatory. In order to protect these gains, the district judge ordered the layoffs to be accomplished by means of a "racial quota concept," which had the "inevitable consequence" that "if racial quotas prevent the excessing of a Black or Puerto Rican, a white person with greater seniority must be excessed in his place." Slip op. 6592. The majority, Judge Oakes dissenting, focussed primarily on the racial quota and held it improper. Significantly for us, however, the court noted the following:

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8 See *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Chance* v. *Board of Examiners*, 496 F.2d 820 (2d Cir. 1974); *Chance* v. *Board of Examiners*, 497 F.2d 919 (2d Cir. 1974).

The relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct[4] or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City school system.

[4] Plaintiffs concede that only a small percentage of the minority supervisors appointed since the inception of this litigation failed the examinations found to be discriminatory, and there is no showing as to how many were even eligible to take such examinations.

* * *

To require a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, *solely* because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination. . . .

If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment—not because he is Black, but because, and only to the extent that, he has been discriminated against. The "freedom now" and "rightful place" doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. *Local 189, United Papermakers* v. *United States, supra*, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the latter involves only the filling of vacancies.

We have followed the "rightful place" doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

There is disagreement among the Circuits as to how far these concepts should be carried in creating fictional dates of employment for minority workers. *Cf. Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 197), *cert. granted*, 419 U.S. 1050 (1975), *argued* November 3, 1975, 44 U.S.L.W. 3273; *Meadows* v. *Ford Motor Company*, 510 F.2d 939 (6th Cir. 1975). Upon remand of this case, the District Court may find it unnecessary to await resolution of this dispute by the Supreme Court. *The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination. We believe this offer of compromise which appears to be acceptable to the intervening Union should have been adopted by the District Court.* [Emphasis added; some footnotes omitted.]

Slip op. 6595, 6596-97.

We regard this language—particularly the emphasized portion—as instructive on the issues before us. What the court in *Chance IV* would not approve was "[t]o require a senior, experienced white [supervisor] to stand aside and forego the seniority benefits guaranteed him . . . solely because a younger, less experienced member is Black or Puerto Rican." The meaning of "solely" in this sentence is clarified by the reference to the concededly "small per-

centage of the minority supervisors appointed since the inception of this litigation" who had failed the discriminatory examinations. Relief for this small group would not be "solely" because they were black; nor would it be a "non-remedial distortion of a seniority system through preferential treatment based solely upon race . . . ." Slip op. 6594. *Chance IV* indicates that retroactive "constructive" seniority, even prior to the date of appointment, might be appropriate relief for any identifiable minority group supervisor who had taken a discriminatory examination and failed. It is for this reason that the majority stated that a compromise embodying precisely that concept "should have been adopted by the District Court."[9]

Such constructive seniority back to the date when they would have been hired had there been no discrimination is the relief sought by the laid-off women here, at least in their amended complaint. We believe that *Bethlehem Steel* and *Chance IV* both indicate that plaintiffs are entitled to that relief if they can prove their case under conditions discussed below. Moreover, we do not rely merely upon the radiations of these two decisions. Even if the slate were clean, we would reach the same results for reasons which, in view of our prior precedents, we set forth more briefly than we might otherwise.

If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since it is based on sexual discrimination. Defendants argue that recognizing such constructive seniority violates 703(h) and point particularly to the Clark-Case Memorandum cited in *Bethlehem Steel*, supra. We

9 On this issue, the dissent agreed with the majority. Slip op. 6609-10. The thrust of the dissenting opinion was that not enough relief was being granted to remedy the past discrimination.

do not agree. The legislative history of that section is sufficiently cloudy to warrant looking at Title VII's purposes and policies in interpreting section 703(h), rather than just at the Clark-Case Memorandum. See Note, Last Hired, First Fired Seniority, 11 Colum. J. of L. and Social Problems 343, 369-71 (1975); Cooper and Sobol, supra note 5, at 1607-14. With those general purposes in mind—particularly the congressional intention in amending Title VII in 1972 "to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible" and to restore aggrieved persons "to a position where they would have been if not for the unlawful discrimination"[10]—we believe that the relief plaintiffs seek would prevent the perpetuation of the effects of past discrimination as to them. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-25 (1975). See also *Watkins*, 516 F.2d at 45.

Our own decision in *Bethlehem Steel*, supra, and the many in other circuits holding discriminatory facially neutral departmental or job seniority[11] lend further support for our view. In determining the effect of section 703(h) as an exception to liability under the Act, we see no sufficient basis for distinguishing between facially neutral depart-

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10 Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, at 7168 (1972).

11 See, e.g., *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Bing* v. *Roadway Express*, 485 F.2d 441 (5th Cir. 1973); *United States* v. *N.L. Industries*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *Chesapeake & O. Ry.*, 471 F.2d 582 (4th Cir. 1972), cert. denied sub nom. *Locals 26S and 1130 of Bhd. of R.R. Trainmen* v. *United States*, 411 U.S. 939 (1973); *United States* v. *Hayes Int'l Corp.*, 456 F.2d 112 (5th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

mental and plant-wide seniority systems. Under certain circumstances, either can for the purposes of Title VII lose the protection of being "bona fide" under section 703(h). Indeed, the very circuit court of appeals that apparently originated the distinction in dictum[12] has recently been careful to note that it may not apply to plaintiffs like these.[13] Moreover, in this case, unlike such departmental seniority cases as *Bethlehem Steel*, we are not invalidating or altering portions of the seniority system at all. We are merely putting plaintiffs in their rightful place in it. Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered "bona fide" and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of section 703(h). Also, there is an element of "fictional," or constructive, seniority in the relief granted in the departmental seniority cases. Plant-wide seniority was used in *Bethlehem Steel* not because it was earned but because it was "a convenient approximation of what the black employees' departmental seniority would have been absent discrimination in the past." Harvard Note, supra note 5, at 1556. It may be that the distinction between seniority from date of hire and earlier, constructive seniority seems attractive because of the unstated moral premise that it is wrong to give seniority credit to one who did not work for it. Harvard Note, at 1555. But the limited number of employees who might get such seniority here were prevented by defendants' wrongdoing from attaining it before. Moreover, as Chief Judge Kauf-

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12 *Local 189, United Papermakers & Paperworkers v. United States*, supra note 11, 416 F.2d at 995.

13 *Watkins v. United Steel Workers of America, Local No. 2369*, supra note 5, 516 F.2d at 47-48.

man notes in his concurring opinion, plaintiffs here have in this respect a more compelling claim to relief than plaintiffs in *Bethlehem Steel*. Plaintiffs here were not merely relegated to inferior jobs, but were denied employment altogether for discriminatory reasons. Finally, in analogous situations arising under the National Labor Relations Act, employers are required "to credit all [discriminated-against] employees with such seniority and other rights and privileges that would have accrued to them as of the dates they would have been hired, absent the discrimination against them." *Atlantic Maintenance Co.*, 134 NLRB 1328, 1336 (1961), enf'd, 305 F.2d 604 (3d Cir. 1962). See also *Consolidated Dairy Products*, 194 NLRB 701 (1971). Cf. also *Titon v. Missouri Pac. R.R.*, 376 U.S. 169 (1964) (awarding back seniority to veterans under the former 50 U.S.C. App. § 469(b), now 38 U.S.C. § 2021(a)).

In short, we believe that the district court erred in apparently concluding that because of section 703(h) layoffs under the facially neutral formula of section 80 of the New York Civil Service Law could not violate Title VII. We disagree as well with the holding that retroactive seniority would necessarily violate section 703(j). See note 4 supra. Award of seniority to those who had actually been discriminated against by these defendants medial device well within the broad power conferred is not a "preference" because of sex. It is rather a re- on the district court by section 706(g). 42 U.S.C. § 2000e-5(g).[14]

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14 This section provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaged in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . .

III

The case must, therefore, be remanded to the district court for further proceedings consistent with this opinion.[15] The record at this point is sparse and it is not clear which facts are admitted and which are contested. The layoffs have already taken place and plaintiffs have indicated that they are flexible as to the relief they now seek, including "placement of appellants at the top of the recall list."[16] The district court should expeditiously determine—either by stipulation or after a hearing—which plaintiffs now laid off would have been hired early enough to obtain sufficient seniority to avoid layoff had it not been for defendants' discriminatory hiring practices. This limited group will be composed only of those plaintiffs who themselves were the victims of discrimination by the defendants.

For guidance of the district court, we suggest that the burden of satisfying the court on this issue by a preponderance of the evidence should be on the individual plaintiffs. The female police officer might, for example, satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females. Relief will, of course, be limited to persons who eventually were accepted as police officers, so there is no question about their qualifications for the job. We empha-

15 On this disposition, it is unnecessary to deal with plaintiffs' claims under 42 U.S.C. § 1983 or their argument that the illegality of defendants' hiring policies prior to Title VII is a controlling consideration in applying § 703(h).

16 Plaintiffs' brief, 37-38.

size that we are not deciding the appropriate relief to which these plaintiffs who can satisfy the above conditions are entitled. That is a matter, in the first instance, for the district court with due regard to the necessity of minimizing disruption in the operation of the Police Department. We decide only that the layoffs here under section 80 of the Civil Service Law were not insulated from attack by sections 703(h) or 703(j) of Title VII, and that those plaintiffs who can show that their lack of seniority is the result of past discrimination by defendants are entitled to relief.

Reversed and remanded for further proceedings consistent with this opinion.

KAUFMAN, *Chief Judge* (concurring):

I fully concur in Judge Feinberg's well-reasoned opinion, and would merely offer a few additional observations in order to avoid any misconstruction of our holding.

One principle is clear to me. We do not, by our holding today, seek to disparage the wide range of benefits that may flow from a properly functioning seniority system. A "last-hired, first-fired" plan appropriately provides longer-employed individuals with a substantial measure of freedom from fear of unemployment. It, therefore, enables them to engage in meaningful long-range personal planning while simultaneously inducing a degree of peace of mind that may enhance their productivity on the job. And, by rewarding the worker who avoids frequent job changes, it may have an impact on the economy itself, by reducing duplicative hiring and training costs, and, of course, it properly benefits the individual employer. The apparent neutrality and fairness of the procedure tends to promote labor peace and, indeed, prohibits the employer from dis-

criminatorily discharging certain individuals because of race or sex.

Accordingly, it is important to emphasize that our holding is in no way intended to alter or compromise the underlying structure of the seniority system established by §80 of the New York Civil Service Law. It merely represents a refusal to allow a system intended as a safeguard against arbitrariness to become a device for perpetuating past caprice. Nor does our decision sanction the use of preferential treatment or reverse discrimination to achieve this end. The standard we have established restricts relief to those who have already demonstrated their qualifications for the position of police officer and can prove that they were improperly deprived of their rightful place in the seniority hierarchy. The maximum remedy authorized by our decision for those plaintiffs who satisfy their burden of proof, under the circumstances present here, is nothing more than to be restored to parity with the male police officers hired at the time these female police officers were discriminatorily denied employment. The only special advantages implicated by our holding are those improperly received by some male police officers, whose location high on the seniority list resulted from unfair discrimination at the expense of equally or more qualified females. Such unjust preferential treatment should be corrected and eradicated.

Of course, to require mathematical certainty of proof would be to render the rights we confer impossible to vindicate in practice. Perhaps two examples will illuminate the results we anticipate. The June 30, 1975 layoffs applied, it appears, only to officers hired after March, 1969. If so, relief should be available to an individual who proves she took the 1964 examination for "policewoman," achieved a score on that examination that, were she a man, would have assured her employment, but nevertheless was

not appointed until 1970 solely because of the low quota for women prevailing in the Police Department in 1964. This person satisfies the burden of proving that she would have had sufficient seniority to withstand the §80 layoff but for the discrimination in 1964. Such a showing would not, however, be possible for a female who became a police officer upon reaching the minimum hiring age for police officers in 1973 (assuming, as we do, that all officers hired after 1969 must be laid off under the §80 formula).

It is conceivable that the standard of proof we require may be difficult or impossible to meet for some female police officers who took no overt action with regard to employment in the Police Department during the years in which discrimination in hiring prevailed. Nor would it be appropriate to interpret our holding as stating that some female officers will be put into a favored position to claim that relief must be automatic even though they cannot establish that the prior discrimination in any way deterred them from, or interfered with their quest for, employment in the Police Department. The proof required should not pose a problem in the future, however, in view of the notice our opinion provides to all. Moreover, because of the male police officers' important countervailing interest, we believe it inappropriate to establish a special or double standard for the plaintiffs before us, even though they obviously had no notice, at the time they suffered discrimination, of the requirements we now impose.

We entertain no doubts that those who do meet the standard of proof here established have a right to be positioned within the seniority system as if they had been hired at a time earlier than they actually were. As Judge Feinberg emphasized, this Court and others have provided remedies under Title VII for minority employees who were hired but discriminatorily relegated

to less desirable departments within a company—and then disadvantaged by facially neutral departmental seniority systems. Surely, it would be incongruous to deny relief to those who were not simply restricted to less attractive jobs, but indeed were discriminatorily refused any employment at all.

UNITED STATES COURT OF APPEALS
JAN 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1112, 1251 September Term, 1974

(Argued August 11, 1975 Decided January 19, 1976

Docket Nos. 75-7161- 75-7164

BOSTON M. CHANCE, LOUIS C. MERCADO, individually on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISIAH E. ROBINSON, Jr., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

Defendants-Appellants.

and

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Intervenor-Appellant.

Before: OAKES, VAN GRAAFEILAND and MESKILL, Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler Judge, which superimposed a racial quota requirement upon the "excessing" procedures of the New York City Board of Education.

Reversed and remanded.

KAYE, SCHOLER, FIERMAN, HAYS & HANDL
New York, N. Y., for Defendant Th
Board of Examiners

W. BERNARD RICHLAND, Corporation Cou
of the City of New York, New York,
N. Y. (L. KEVIN SHERIDAN, LEONARD
KOERNER, LEONARD BERNIKOW, New Yor
N. Y., of Counsel), for Defendant
The Board of Education of the City
of New York

MAX H. FRANKLE, LEONARD GREENWALD, Ne
York, N. Y., (GRETCHEN WHITE OBERM
New York, N. Y., of Counsel), for
Intervenor-Appellant Council of
Supervisors and Administrators of
the City of New York, Local 1, SAS
AFL-CIO

JACK GREENBERG, DEBORAH M. GREENBERG,
New York, N. Y., ELIZABETH B. DuBO
JEANNE R. SILVER, GEORGE COOPER, Ne
York, N. Y., for Plaintiffs-Appell

VAN GRAAFEILAND, Circuit Judge:

This is an appeal from an order of the United States District Court for the Southern District of New York which directed the Board of Education of the City of New York to "excess" supervisory personnel in accordance with a formula imposing racial quotas upon the excessing process. Excessing rules provide in brief that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. It is a system which recognizes the value of pedagogical experience and seniority, and its use is mandated by the New York Education Law[1] and the Collective Bargaining Agreement between the Board of Education and the supervisors' union.[2] We believe that the District Court erred in injecting into this plan a requirement for conformity to a racial quota formula, and we therefore reverse.

Fortunately for both reader and writer, we find it unnecessary to recount at length the history of this extended litigation. A summary of the proceedings which now bring the parties to our Court for the fourth time[3] will suffice.

This civil rights class action was begun in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City school system. Employment qualification tests, one of the alleged causes of such disproportion, were thereafter invalidated by the District Court as not job-related; and an interim system of job assignment was created by court order, the details of which are spelled out in our 1974 decision. Because this interim plan provided in part that job assignment would precede

licensing and that permanent appointment would follow on-the-job evaluation, it became necessary for the Board of Educatio to formulate new rules concerning date of appointment for excessing purposes. These rules, which were submitted to th District Court for approval, provided in substance that, in determining seniority for excessing purposes, supervisors would be considered appointed as of the date of their assignment.

As Judge Tyler graphically pointed out during one of the many arguments below, this law suit has been "like a conflagration that one puts out in one department and then suddenly a new fire breaks out somewhere else." It was not surprising, therefore, that this submission by the Board set new flames burning. Plaintiffs promptly opposed the use of any excessing rules on the ground that minority supervisors recently hired would have the least seniority. This prompted intervention by the Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO as the repre sentative of all supervisory personnel, including those licensed and appointed prior to the court-ordered interim plan, those licensed and appointed pursuant to such plan and those assigned but not yet appointed. This Union opposed the use of racial quotas and supported the continued use of tradi tional excessing procedures. Amicus briefs were also filed b the New York City School Boards Association, Inc. whose interest lay in seeing that the powers and prerogatives of th thirty-two school districts within the New York system were not eroded by the court-created excessing plan.

Proposals and counterproposals followed closely upon

each other until Judge Tyler handed down an order on November 22, 1974, adopting the racial quota concept. This order was amended on February 7, 1975, and it is the amended order which we are reviewing on this appeal. It provides in substance as follows:

1. All supervisors are to be divided into three groups: group A - Blacks, group B - Puerto Ricans and group C - Others;
2. The percentage of supervisors making up each group is to be computed for each of the thirty-two districts and for the city-wide system;
3. Each district may place supervisors from group A or B on its intra-district excessing list only if the percentage of that group on the list does not exceed the percentage of that group in the district;
4. Each district may add excessed supervisors from group A or B to the city-wide, inter-district excessing list only if the percentage of that group on the list does not exceed the percentage of that group employed city-wide.

Although the order does not specifically so provide, the inevitable consequence of the foregoing provisions is t if racial quotas prevent the excessing of a Black or Puerto Rican, a white person with greater seniority must be excessed in his place.

Before the merits of the appeals taken by the Board of Education and the Council of Supervisors can be considered several preliminary roadblocks raised by plaintiffs must firs

be removed. Plaintiffs contend that the appeals are not timely. They say that the order of February 7, 1975, merely clarified the order of November 22, 1974, and that therefore appeals should have been taken from the former, not the latter. We find no merit in this contention. Following the issuance of the November 22 order, the Board of Education requested a modification "concerning excessing." A hearing was held, and some modifications were made. We think that the Board's application, addressed sufficiently to the substance of the November order to require a contested rehearing, effectively transferred the mantle of finality from the November to the February order and that appeals from the latter order were therefore timely. Leishman v. Associated Electric Co., 318 U.S. 203 (1943); Sleek v. J. C. Penney Company, 292 F.2d 256 (3d Cir. 1961).

Plaintiffs also point out that the order appealed from will be in effect only until November 30, 1977, by which time "it is hoped" the situation regarding minority representation will have changed. Plaintiffs urge that we not concern ourselves, as an appellate court, with this short-term interim relief. In our 1974 decision, at page 825, we expressed concern about the length of time this litigation had remained in an unfinished state and the possibility that "the interim tail" would end up wagging the dog. Another year has passed; the lawsuit has not been terminated, and new orders continue to emerge. Those supervisors who may lose their jobs between now and November 30, 1977, will be little comforted by the knowledge that it was merely a temporary order that put them out of work. Where the basic rights of such innocent non-

litigants are so substantially involved, we believe we shoul as we have twice before, review what has been done.

We thus come to the main question on this appeal, v does a facially neutral excessing plan, which operates on th concept of "last hired-first fired," discriminate against minorities who are disproportionately affected? We agree wi the Courts of Appeals of the Third, Fifth and Seventh Circuit that the answer to this question must be "no." See Waters v Wisconsin Steel Works of International Harvester Company, 50 F.2d 1309 (7th Cir. 1974), petition for cert. filed, 44 U.S.L. 3011 (Apr. 25, 1975); Jersey Central Power and Light Co. v. Local Union 327, I.B.E.W., 508 F.2d 687 (3d Cir. 1975), petitions for cert. filed, 44 U.S.L.W. 3084 (Aug. 1, 1975), 44U.S.L.W.3207 (Sept. 24, 1975); Watkins v. Steel Workers Local No. 2369, 516 F.2d 41 (5th Cir. 1975).

Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII[4], and they are in accord that this Act was not intended to invalidate bona fide seniority systems. Waters, supra, at 502 F.2d 1318; Jersey Central, supra, 508 F. At 7 Our brothers in the Fifth Circuit say that "regardless of wh that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority a between whites and persons who had not suffered any effects discrimination." Watkins, supra, 516 F.2d at 1302. All agr as do we, that the non-remedial distortion of a seniority sy tem through preferential treatment based solely upon race is form of reverse discrimination specifically proscribed by Co gress. Jersey Central, supra, 508 F.2d at 709; Waters, supr 502 F.2d at 1319; Watkins, supra, 516 F.2d at 1301. See als

Local 189, United Papermakers v. United States, 416 F.2 980, 994 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

That plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack. Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000(e)(2).[5] Whether this section be considered a repeal by implication of any possible contrary construction of § 1981, or simply a statement of guiding legal principles, we agree with the court in Waters that "having passed scrutiny under the substantive requirements of Title VII, the employment seniority system ... is not violative of 42 U.S.C. § 1981." Waters, supra, 502 F.2d at 1320 n.4.

The relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct[6] or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City school system. Our limited approval of the use of racial hiring quotas in such cases as Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), and Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973), is not authority for what the district court has done. We were concerned in those cases with discriminatory hiring practices, and the remedial relief which we approved concerned only hiring procedures. Because there is no claim that defendants' excessing practices are or have been discriminatory, we see no justification for changing them.

v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), about the "bumping" effect of a quota "upon a small number of readily identifiable" individuals finds equal cause for expression in the situation which now confronts us. We are advised that in some of the school districts employees will be excessed from groups containing as few as two or three persons. To require a senior experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination.[7] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 209 (1944) (Murphy, J., concurring); Kirkland, supra, 520 F.2d at 429.

If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment -- not because he is Black, but because, and only to the extent that, he has been discriminated against. The "freedom now" and "rightful place" doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. Local 189, United Papermakers v. United States, supra, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary, the latter involves only the filling of vacancies. We have followed the "rightful place" doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).[8]

There is disagreement among the Circuits as to how far these concepts should be carried in creating fictional dates of employment for minority workers. Cf. Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, 419 U.S. 1050 (1975), argued November 3, 1975, 44 U.S.L.W. 3273; Meadows v. Ford Motor Company, 510 F.2d 939 (6th Cir. 1975). Upon remand of this case, the District Court may find it unnecessary to await resolution of this dispute by the Supreme Court. The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination. We believe this offer of compromise which appears to be acceptable to the intervening Union should have been adopted by the District Court.

A reversal of the order appealed from renders moot the controversy between the Board of Education and the community districts as to whether intra-district as well as inter-district racial quotas should be used and applied in the excessing process. We note that the New York Court of Appeals has specifically held that the Board of Education has the power to establish uniform City-wide excessing rules Council of Supervisors and Administrators v. Board of Education, 35 N.Y.2d 861 (1974) (mem.). Should the question of excessing authority vis-a-vis the community districts and the Board of Education again arise in this proceeding, we trust that the District Court will defer to the New York State courts' primary concern and expertise in this matter, in so far as it is feasible to do so.

Reversed and remanded for further proceedings in accordance with this opinion.

FOOTNOTES

1. Section 2585 of the Education Law § 2585 (McKinne 1970) provides in pertinent part as follows:

> 2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.
>
> 3. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.
>
> 4. In a city having a population of one million or more, no member of the teaching or supervising staff who has been regularly appointed in accordance with merit and fitness, determined by competitive examination, shall be dismissed upon the abolition of his position if:
>
> a. The superintendent of schools, upon the recommendation of the board of examiners, certifies to the board of education that such member is competent to serve in any vacant position in the same rank or level or in a lower rank or level of service with such board; and
>
> b. The superintendent of schools, upon direction of the board of education, assigns such member to any such vacant position, in which event such member so assigned shall serve in such position without reduction of salary.
>
> 5. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such corresponding or similar positions in the order of their length of service in the system.

2. The Collective Bargaining Agreement contains a set of detailed excessing rules. In addition, it provides that the "provisions of law" will be followed in all City-wide excessing situations.

3. See Chance, et al. v. Board of Examiners, et al., 458 F.2d 1167 (2d Cir. 1972); Chance v. Board of Examiners, 496 F.2d 820 (2d Cir. 1974). On May 15, 1974, this Court dismissed a third appeal without opinion. Chance v. Board of Examiners, 497 F.2d 919 (2d Cir. 1974).

4. 42 U.S.C. § 2000e, et seq.

5. 42 U.S.C. § 2000e-2(h) provides in pertinent part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ... ."

6. Plaintiffs concede that only a small percentage of the minority supervisors appointed since the inception of this litigation failed the examinations found to be discriminatory and there is no showing as to how many were even eligible to take such examinations.

7. The discriminatory effects of such conduct would be even more apparent if the senior member were female and thus entitled to the same protection against discharge under § 2000e-2 as a Black. Indeed, if the quota system is proper, the day is not far away when women will seek its assistance in displacing minority workers.

8. In Bethlehem Steel, we authorized the use of plant seniority only for the purpose of filling vacancies and not to "bump" white workers. We said, at 446 F.2d 661: "Both groups will bid against each other for vacancies on the basis of plant-wide seniority; an earlier hired white employee will have greater seniority than a later-hired black."

A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

OAKES, Circuit Judge (dissenting):

To my mind the issues are both more ~~simple and~~ more complex than the majority states. They are more simple in that what we are here concerned with is the fashioning of equitable relief under 42 U.S.C. § 1981[1] as a remedy for past racially discriminatory practices. The relief ordered by the district court limits transfers and layoffs of black and Hispanic school supervisors who have only been hired or promoted to their jobs as supervisors since the abolition by court order of racially discriminatory qualifying examinations.[2] This order seems to me to be one properly within the equitable power of the court as a device to protect the integrity of its remedial plan. It is true, however, that the percentage, or "quota," layoff limitation method of the district court was not the only permissible relief which could have been ordered. Were the only class involved that of persons, like the named plaintiff Chance, who were kept from their rightful place on the seniority list by their inability to pass the discriminatory examinations, I would agree with the majority that giving such persons "constructive seniority" effective as of the "mean appointment date" of those who passed the exam which the persons discriminated against had failed might very well be adequate and proper relief.[3] But our case is more complex than this. There is a second class in the litigation before us which is composed of persons who, like the named plaintiff Mercado, "have failed to apply for or take

FPI-Sandstone
6-2-79-7134-3643

such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance."[4/] These people, who comprise by far the largest portion of the plaintiffs in this case,[5/] are left wholly unprotected by the "constructive seniority" approach of the majority. Since I believe the district court has discretion to make a reasoned choice among those remedies which are available to effect relief for those who have been injured by the discriminatory exams, and since in the situation before us the use of layoff quotas by the district court was an attempt to do rough justice where perfect equity was not achievable, I must respectfully dissent.

This litigation was begun in September of 1970, challenging the examinations used to select principals and other supervisory personnel in the city school system on the basis that the examinations discriminated unconstitutionally against minority groups. It was brought under 42 U.S.C. §§ 1981, 1983, and not under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. But it is interesting to note that Section 703(h) of the latter, 42 U.S.C. § 2000e-2(h),[6/] by negative implication makes it an unlawful employment practice "for an employer to give and to act upon the results of" a "professionally developed ability test" where the test itself, its administration or action upon its results is "designed, intended or used to discriminate because of race .... " Assuming, as appellees

FPI-Sandstone
6-3-79-75M-5643

argue, that even though Section 1981 and Title VII are independent, if overlapping, remedies, Johnson v. Railway Express Agency, 421 U.S. 454 (1975), it is desirabl nevertheless that the substantive law relating to what is discrimination be the same under both Section 1981 and Title VII. The provisions of Title VII are by no means inconsistent with, indeed they seem to compel, the original determination in this suit that the supervisory examination were unconstitutionally discriminatory. Chance v. Board of Education (Chance I), 330 F. Supp. 203, 224 (S.D.N.Y. 1971) (preliminary injunctive relief given), aff'd, 458 F.2d 1167 (2d Cir. 1972). Extensive negotiations and additional proceedings in the district court culminated in the entry on July 12, 1973, of a final judgment against the Board of Examiners. This order prohibited the continued implementation of the old discriminatory examination system, mandated the institution of an interim system for filling vacant positions and ordered the development of a permanent new selection system. These orders were again upheld by this court in Chance v. Board of Education (Chance II), 496 F.2d 820 (2d Cir. 1974).

Meanwhile, however, the Board of Education had directed community school boards to fill supervisory vacancies in accord with the "transfer list" provisions of the union contract. This resulted in giving priority to those supervisors who had acquired seniority with licenses obtaine under the old discriminatory examination system. On

FPI-Sandstone
8-2-76-T2M-3043

December 27, 1973, Judge Mansfield, acting as district judge, held that "the transfer provisions of the [union] agreement, by giving a preference to senior supervisory personnel, violates our Orders." Recognizing that timing in the framing of equitable decrees seeking to remedy past discrimination is of the utmost importance, however, he was then extremely careful to say that

> This interpretation should not be construed as permanently prohibiting the use of seniority as a basis for selection and appointment of applicants. Following the adoption of a permanent non-discriminator system for the selection of supervisors in the New York City School System there will undoubtedly come a time when seniority among those selected under such a system can be appropriately recognized. To give preference to those appointed under a discriminatory testing system, however, which is the effect of the [union] agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed.

No appeal was taken from this order and Judge Tyler, to whom the case was assigned, declined by order of February 25, 1974, to rescind or alter it. The union's appeal from Judge Tyler's February 25, 1974, order was dismissed as not appealable. Chance v. Board of Education (Chance III), 497 F.2d 919 (2d Cir. 1975).

In July, 1974, the Board of Education submitted proposed rules to govern "excessing" of supervisors. These would have required that persons whose positions are to be abolished, and those junior to them holding similar or lower positions, be relocated, demoted or terminated, as the case might be, in order of reverse seniority. Appellees opposed the rules on the basis that, like the transfer

FPI-Sandstone
6-3-76-75M-3643

provisions of the union agreement, the proposed excessing rules would conflict with the remedial purposes of the orders affirmed in Chance II which had held the qualifying exam to be unlawful and had ordered development of a new selection system. After five hearings and assorted submissions Judge Tyler issued an order on November 22, 1974, which, in all material respects, is identical to the order of February 7, 1975, here under appeal. This order permits the use of seniority excessing rules only insofar as the proportion of blacks and Hispanics "excessed" does not exceed the proportion of black and Hispanic supervisors presently employed in each school district and the school system as a whole. His order was made effective retroactively to July 30, 1974, and prospectively until November 30, 1977.

On timely application of the Board of Education the order was modified in certain respects not material here on February 7, 1975. This appeal was brought from that order. I should add that I agree with the majority's view that the February order is final and appealable.

In evaluating the propriety of Judge Tyler's excessing quota order, it is necessary to consider three separate questions: first, whether the order is unconstitutional; second, whether the order is forbidden by statute under 42 U.S.C. § 2000e-2(h), see note 6 supra; third, whether, if not prohibited by statutory or constitutional law, the order is within the equitable authority of the trial court.

FPI-Sandstone
8-3-79-7536-5643

These issues will be discussed in order below.

I think the remedial relief afforded was constitutionally allowable for the reasons stated so well by my brother Mansfield, dissenting from the denial of rehearing en banc in Kirkland v. New York State Department of Correctional Services, Nos. 74-2116, 74-2258 (2d Cir. Dec 10, 1975), slip op. 1003. I need add to his remarks only that it would have been constitutionally permissible, and I think also within the district court's powers, to base "excessing" on some principle other than racial percentage -- merit, constructive seniority, sharing of the available work or the like. Just as veterans' preferences permissibly reward those for service to their country, given hiring (or firing) preferences favoring those of a minority race (or I would add the female gender) who have been victimized by discrimination until a fair equality of treatment is achieved seem to me to be constitutionally proper. The purpose of the order is to protect, to a limited extent, the black or Hispanic teachers who have recently been made supervisors in retention of their employment, not because they are black or Hispanic but because they have previously been discriminated against by unconstitutional examinations. See Nickel, Preferential Policies in Hiring and Admissions: A Jurisprudential Approach, 75 Colum. L. Rev. 534, 555 (1975). See also Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727 (1974). But cf. Greenawalt, Judicial Scrutiny of "Benign" Racial

FPI-Sandstone
8-2-75-TIM-1043

Preference in Law School Admissions, 75 Colum. L. Rev. 559, 571-73 (1975). On the other side of the scale, the white supervisory personnel disadvantaged by the district court's order would not, it must be presumed from the decisions in Chance I and Chance II, supra, necessarily have gained their preferred place on the seniority ladder were it not for the fact that the qualifying examinations were discriminatory against nonwhites. Thus, they are not in the position, say, of a DeFunis whose superior qualifications are overlooked in favor of less qualified minority students; the white supervisory personnel whose seniority is entrenched by the majority (subject, perhaps, to constructive seniority for the Chance class) have been the very people who have benefited from the school system's prior discriminatory policies. The suggestion that bumping seniors is "constitutionally forbidden reverse discrimination" may find support in dictum in Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 428-29 (2d Cir. 1975). It may be that it can also find support elsewhere. See, e.g., DeFunis v. Odegaard, 416 U.S. 312, 333, 343-44 (1974) (Douglas, J., dissenting). I find it a little ironic, however, that the Supreme Court authority cited by the majority is Mr. Justice Murphy's concurring opinion in Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 209 (1944), where the Court construed the Railway Labor Act to require a railroad brotherhood to represent all members of the craft union and not to discriminate against a Negro member on account of his

FPI-Sandstone
6-2-76-7344-3643

race. Justice Murphy's remark that "[t]he Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color," id., is merely a statement of the protective nature of the shield provided to minorities by the Fourteen Amendment -- it should not be applied out of context as a sword to prevent remedial relief, in the form of affirmative action, for those who have suffered the discrimination which the Amendment condemns. The powers of a court of equity to eliminate the effect of past discrimination are broad, Louisiana v. Black, 380 U.S. 145, 154 (1965), and seem clearly to encompass the affirmative, remedial action ordered here, as recognized in United States v. Montgomery County Board of Education, 395 U.S. 225, 236 (1969), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25 (1971). See also Kirkland v. New York State Department of Correctional Services, Nos. 74-2116, 74-2258 (2d Cir. Dec. 10, 1975), slip op. at 1006-10 (Mansfield, J., dissenting from denial of rehearing en banc) (citing cases from our court and seven other circuits).

Complaints of reverse discrimination have to be evaluat constitutionally with careful regard to the facts of each case, since any affirmative action to correct past discriminatory practices may result in what seems to be unfairness to those who have benefited by those practices. The complaint of "reverse discrimination" should not be allowed to obscure the need for action to be taken to

FPI-Sandstone
6-3-75-72M-3043

reverse, or negate, the effects of unlawful discrimination found to exist, as in this case. The focus of our concern should be upon whether there is an accurate method of redressing past discrimination in such a way as to benefit those who have been discriminated against only at the expense, if at all, of those who gained undue advantage by the discrimination. If an accurate method cannot be had, then we may examine whether some rougher form of relief, as for instance a percentage preference, achieves a measure of fair redress at no undue expense.

Before reaching these last two questions it is necessary here to respond to the majority's view that Judge Tyler's order was forbidden as a matter of law by Section 703(h) of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(h), note 6 supra. In this regard it may be conceded that the majority appears to be upon firmer ground than in its constitutional argument. The majority relies upon Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3505 (U.S. Mar. 18, 1975); Jersey Central Power & Light Co. v. Electrical Workers Local 327, 508 F.2d 687 (3d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975), and Watkins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975). The Waters and Jersey Central courts have each read the legislative history of Title VII as indicating that layoffs made pursuant to plant-wide seniority systems that operate in a facially neutral

FPI-Baltimore
8-3-75-1138-3643

manner are pursuant to "bona fide" seniority plans and cannot, therefore, constitute unlawful employment practices under Title VII. See 42 U.S.C. § 2000e-2(h); note 6 supra. They reached this result even where the result of the seniority plans was to entrench the effect of prior discrimination against minority workers. See Jersey Central, supra, 508 F.2d at 710; Waters, supra, 502 F.2d at 1317; but see id. at 1320. Other courts and commentators have been more circumspect, however, regarding the fair implications of the legislative history of Title VII. Judge Van Dusen, concurring in Jersey Central only for the purpose of agreeing in the necessity of a remand for further findings, expressly disagreed with the Jersey Central majority's reading of Title VII. He found "persuasive the writers who contend that the legislative history indicates that Congress did not intend to preclude remedies altering plant seniority which perpetuates discrimination." 508 F.2d at 712 (emphasis added), citing, e.g., Cooper & Sobol, Seniority and Testing Under Fair Employment Law: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1629 (1969); Comment, The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB, 123 U. Pa. L. Rev. 158, 163-64 (1974). See also Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544, 1552 (1975) (legislative history of Title VII inconclusive as to scope of protection intended for "bona fide" seniority systems).

FPI-Sandstone
6-3-76-7334-3643

This reading of Title VII is, in fact, suggested by the plain language of 42 U.S.C. § 2000e-2(h), which does no more than to declare that bona fide seniority systems cannot, of themselves, constitute an unlawful employment practice. This provision stops far short of stating that where, as in the present case, unlawful employment practice other than bona fide seniority systems have been found to have resulted in discrimination against minority workers, courts may not, in the exercise of their remedial authority alter the effect such seniority plans may have in entrenching the results of the prior discrimination.[7] The courts have already recognized this remedial-substantive law distinction, at least by necessary implication. Where a facially neutral departmental seniority system has the effect of discriminating, in the layoff situation, against minority employees who have recently transferred into that department as a result of the employer's termination of prior unlawful practices, the courts have all recognized that giving constructive, or "plantwide" seniority as a means of protecting the transferred employees is a proper remedial order. See, e.g. Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). Even the courts in Waters, supra, 502 F.2d at 1320, and Jersey Central, supra, 500 F.2d at 705 & n.48, have acknowledged the propriety of the plantwide seniority remedy to prevent the entrenchment of post departmental discriminations. The third case cited by the

FPI-Bandstone
8-9-70-7M-1043

majority, Watkins, is consistent, rather than conflicting, with the analysis which suggests that even though bona fide seniority systems are substantively lawful under 42 U.S.C. § 2000e-2(h), they may be disturbed as part of the remedy for other unlawful discriminatory practices. In the Watkins case the Fifth Circuit panel was most cautious in holding that the bona fide seniority system there challenged was only protected "where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination." 416 F.2d at 45. It is the absence of an identifiable independent discriminatory practice or substantive law violation, and that alone, which in Watkins, and one might add in Jersey Central as well, forecloses remedial interference with bona fide seniority systems.

Our present case is, of course, quite different from the Watkins, Waters and Jersey Central cases. We have before us the history of a discriminatory practice which has resulted in a prolonged failure to hire black and Hispanic supervisors into the New York school system. See note 7 supra. As part of the remedial effort to bring minority supervisor applicants who have suffered past discrimination into the New York schools, and to maintain them there, and as a remedy to offset the loss of unknown years of deserved seniority, I submit that it is permissible to alter the "bona fide" seniority system of the school system even if that seniority system does not itself independently

FPI-Sandstone
9-8-78-7132-5643

constitute an unlawful employment practice. This conclusi that remedial authority may require action to be taken whic substantive law would not itself independently require, is by no means a novel concept in the jurisprudence of equal protection. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 17, 31. In fact, in my view the majority opinion in this case has itself conceded this principle, at least implicitly, by directing the district court to consider the use of "constructive seniority" to afford relief to minority workers in the class of plaintiff Chance. Clearly the grant of such artificial seniority is but a construct for interfering wit what the majority insists is a "bona fide" seniority system That is to say, the majority's continued insistence upon the sanctity of the seniority system which it deems "bona fide" is inconsistent with a willingness to grant remedial interference with that system in the form of "constructive seniority."

Having crossed what I believe to be the misconceived hurdle of Title VII, and recognizing the continuing integri of the remedial powers of the district court, we are still left with the difficult problem whether the particular remedy chosen by the district court is reasonably designed to help those who have suffered from discrimination without unduly harming others. At this level of consideration it is apparent that the district judge faced several choices. He could have followed the approach suggested by the

FTI-Sandstone
9-2-79-7334-3643

majority, which would grant constructive seniority to those in Chance's class back to the mean appointment date of persons who took and passed the discriminatory exam which persons like Chance took but failed. Were Chance's class the only one involved in this litigation this remedy would appear to represent a sufficient conciliation of the interests of the previously discriminated and previously favored employees. But see note 3 supra. But the present suit involves another (and much larger) class, composed of persons like plaintiff Mercado who never took the discriminatory examinations but who were discouraged from taking them by knowledge of their discriminatory characteristics. The district court could well have considered that it was necessary to give constructive seniority to members of Mercado's class, as well as Chance's. See Note, Last Hired, First Fired Layoffs and Title VII, supra, 88 Harv. L. Rev. at 1557-60. This seems especially likely in view of the fact that the members of Mercado's class far outnumber those in Chance's class, see note 5 supra, and that a remedy for the latter alone would therefore be quite inadequate for the litigation as a whole. But in many cases it would be difficult, if not impossible, fairly to compute constructive seniority for these persons who were discouraged from ever applying to take the discriminatory examination. The use of a few broad parameters for determining constructive seniority has been suggested in such a case. 88 Harv. L. Rev. at 1559

FPI-Sandstone
6-3-70-7LM-3643

One approach might be to give members of Mercado's class seniority equal to the average seniority of nonminority workers of the same age. Id. Another possibility would be to assume that persons in Mercado's class were interested in becoming supervisors (which seems likely because they have now applied for these jobs) and would have applied to take a nondiscriminatory exam as soon as they were qualified, in terms of years of service as teachers, to do so. Assuming a person could take the exam after, say, four years of teaching experience, constructive seniority could be given to members of Mercado's class as of the mean appointment date for those who passed the first examination given after the class member had taught for four years. Had the district judge determined that some relief of this type was necessary to afford appropriate relief for the members of Mercado's class, the majority's arguments directed against quotas as such would be inapplicable. While the computation of such constructive seniority would provide only a rough measure of justice among the affected persons, this is a situation where perfect justice seems impossible to attain. A greater objection to the "constructive seniority" approach suggested here is that its administrative difficulties may be substantial, if not overwhelming. If pre-examination requirements include more than merely years of teaching experience,[8/] there may be no convenient criteria from which "constructive seniority" for members of Mercado's

FPI-Sandstone
6-2-70-75M-3643

class could be computed.

A third possible remedy, the one chosen by the distric court here, avoids the considerable administrative difficul which may well exist under the constructive seniority metho once, as seems necessary to me, the problem of Mercado's class, or persons mentioned in note 3 supra, is considered. Use of a quota for limiting the layoffs of minority supervisors is an easily implemented device which provides substantial protection for both of the discriminated classes in this suit. It is true that the measure of justice afforded by the quota technique may in some instanc be considerably rougher than that obtained by the constructi seniority approach.[9] Considering the situation as it lay before the district court, however, with the inability of the interested parties to agree on a fair remedy, with a multiplicity of diverse interests and problems of administering relief as well as difficulties in finely tuning other relief to suit exactly ascertainable equities, I cannot conclude that the quota is so broad and rough a measure of justice that it was beyond the discretion of the trial court. The appellants have forwarded no data suggesting that the quota sweeps in substantial numbers of persons not entitled to relief, and therefore I assume that this effect is not great in this case. And, while the quota technique may also hypothetically operate quite inexactly, it cannot be denied that the constructive seniority approach is rather artificial in its performance

FPI-Sandstone
8-3-79-75M-5543

too. I cannot, then, conclude that the quota order appealed from was an abuse of the discretion of the district court, at least where as here it is dealing with an interim situation only. Rather, here I believe we should adhere to the guidance of the Supreme Court in International Salt Co. v. United States, 332 U.S. 392, 400 (1947), which suggests that "[t]he framing of decrees should take place in the District rather than in Appellate Courts."

In summary, I believe that the three important questio before us in this case have been incorrectly decided by the majority. The use of quotas as a remedial limitation on the layoff of minority personnel hired as the result of court-ordered changes in discriminatory employment practices does not violate the Constitution. Nor do such quotas, when they are used as a remedy for past discriminatory practices, violate Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) Finally, the quality of the justice obtained by the use of the quota is not so rough that, considering the imperfection of the alternative remedies and the administrative convenience of the quota, the order therefor was an abuse of discretion.

I therefore dissent.

1. The equitable powers of the district court under 42 U.S.C. § 1981 are at least as great as those under Title VII, § 706(g), 42 U.S.C. § 2000e-5(g), which states in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. ...

An example of a court's broad utilization of those powers in connection with a facially neutral departmental seniority plan which froze black employees "into a discriminatory caste" is found in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1373 (5th Cir. 1974), where the court said: "The principle of the illegality of a facially neutral seniority system superimposed on a history of employment discrimination is so well settled that extended discussion is unnecessary." See generally Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975).

2. See Chance v. Board of Education, 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F.2d 1167 (2d Cir. 1972) (preliminary injunctive relief upheld); Chance

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6-3-76-75M-3643

v. Board of Education, 496 F.2d 820 (2d Cir. 1974) (permanent relief partially afforded).

3. Although it would not cover persons who were discouraged from taking the examinations for a period of years because of a reasonable belief that they were discriminatory but who subsequently took the examinations and failed.

4. Chance v. Board of Examiners, 70 Civ. 4141 [75-7161], May 21, 1973, order of Mansfield, J., at p. 7:

> (1) Finding that all of the conditions precedent prescribed by Rule 23(a) for maintenance of the action as a class suit are met, we grant plaintiffs' motion pursuant to Rule 23(b)(2) for an order allowing it to be so maintained. The class shall include all Blacks and persons of Puerto Rican origin or descent who (1) have failed examinations for supervisory positions in the New York City School System; or (2) have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance; or (3) have taken such supervisory examinations and have been or are in the process of being evaluated for eligibility lists to be promulgated; or (4) are eligible or will be eligible for supervisory examinations to be given in the future.

Although Judge Mansfield's order refers to Puerto Rican members of the discriminated class, I have followed the usage of the parties in their briefs and used the term "Hispanic" to refer to these persons.

5. Letter dated January 24, 1975, from Jeanne K.

[Page iiA follows]

FPI-Sandstone
8-2-75-7234-3041

Silver, attorney for plaintiffs, to the Honorable Harold R. Tyler, then United States District Judge for the Southern District of New York.

6. Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

[Page iii follows]

FPI-Sandstone
6-3-79-7M-3543

this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

7. The opinion in Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 428 (2d Cir. 1975), pointedly distinguished Chance v. Board of Education, ~~supra~~ 330 F. Supp. 203 (S.D.N.Y. 1971), on the basis that the Chance proof of past discrimination was much clearer. Kirkland, incidentally, also involved "permanent" quotas. ~~Id.~~ 520 F.2d at 428.

8. Discussion of other prerequisites to the supervisor's examination is shown in Chance v. Board of Examiners, 330 F. Supp. 203, 207 (S.D.N.Y. 1971). One such prerequisite is "two years' experience of supervision in day schools under license and appointment, or

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... various alternative experience requirements." Id. Whether the district court could or should factor such considerations into a constructive seniority computation for members of Mercado's class cannot be determined at this appeal. These complications might well, however, weigh severely against use of the constructive seniority method in this case. Judge Tyler was after all deciding a case involving human, not mathematical, equations.

9. For example, a minority person who took and failed the discriminatory examination ten years ago may, under the quota system, be laid off before a white or minority supervisor appointed under the non-discriminatory selection system if the former happened to have been appointed a supervisor after the other two. Also, a black or Hispanic supervisor is protected by the quota and may be laid off only after whites appointed before him have been, even if he passed the discriminatory examinations, or even if he became a supervisor after the discriminatory examinations were outlawed and had never failed or been discouraged from taking them. The majority is quite correct in pointing out that the quota method protects all minority supervisors, even those who were able to overcome the discrimination to achieve their position or who were never discriminated against. While this effect does not make the quota an

FPI-Sandstone
8-2-79-TJM-3643

unconstitutional form of "reverse discrimination," it can be argued to weigh against the reasonableness of the quota as a remedial device for use by the district court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.,	:	72 Civ. 928 (S.J.R.)
Plaintiffs,	:	PLAINTIFFS' EXPEDITED DISCOVERY DEMAND
-against-	:	
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,	:	
Defendants	:	

----------X

Plaintiffs request that defendants Civil Service Commission of the City of New York, Department of Personnel of the City of New York, the New York City Police Department and their Commissioners answer the following interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure and produce for copying and inspection in the offices of counsel for plaintiffs, Christopher Crowley, 1 Chase Manhattan Plaza, New York, New York, the following documents requested pursuant to Rule 34 of the Federal Rules of Civil Procedures:

1. List by seniority, race and ethnicity (Black, Hispanic and others) and entry level examination number all New York City Police Department police officers who are presently on duty.

2. List by seniority, race and ethnicity (Black,Hispanic and others) and entry level examination number all New York City Police Department police officers presently laid-off.

3. State the date of next planned or anticipated recall of New York City Police Department police officers and the number of persons to be recalled.

4. State the date of next planned or anticipated lay-off of New York City Police Department police officers and the number of persons to be laid-off.

5. State the name, position, and agency of the person or persons responsible for studying the job relationship of a height requirement for the position of New York City Police Department police officer and produce any and all documents which relate to the job relationship of the height requirement to the position of police officer.

DATED: New York, New York
March 24, 1976

Kenneth Kimerling

OSCAR GARCIA-RIVERA
KENNETH KIMERLING
PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
95 Madison Avenue,
New York, New York 10016

CHRISTOPHER CROWLEY, ESQ.
1 Chase Manhattan Plaza
New York, New York

JACK GREENBERG, ESQ.
DEBORAH GREENBERG, ESQ.
10 Columbus Circle
New York, New York

Attorneys For Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.,	:	72 Civ. 928 (S.J.R.)
Plaintiffs,	:	
-against-	:	AFFIDAVIT
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,	:	
Defendants	:	

----------X

KENNETH KIMERLING, being duly sworn deposes and says:

1. I submit this affidavit to supplement my earlier affidavit on plaintiffs' Order to Show Cause.

2. This morning's news highlights the need for expeditious treatment in this matter. The New York Daily News on page 5 of today's (March 25, 1975) edition announced that there would be further lay-offs of police officers (A copy of the article is attached). A total of some 300 jobs will be lost by the Police Department. This can only further perpetuate the past discriminatory acts of defendants which caused Minorities to be the last hired. While the article is certainly hearsay, defendants who are in control of the facts upon which the article is based can rebut the facts stated if they are inaccurate.

3. This morning's news further announced that the United States Supreme Court had reversed Franks v. Bowman Transportation Company, 495 F.2d 395 (5th Cir. 1974) and held that the courts are required to construct seniority for persons able to demonstrate past discrimination (A copy of the March 25, 1976, New York Times article is attached). This decision in essence affirms the Second Circuit holding in Acha v. Beame (Docket No. 75-7388, February 19, 1976) which so closely parallels the instant action.

4. The need for expedited treatment is clear from this morning's news as is the merits of plaintiffs' claims. Plaintiffs respectfully request that the order requiring expedited discovery issue forthwith.

Kenneth Kimerling
KENNETH KIMERLING

Sworn to before me this
25 day of March, 1976

Robert Gritz Rauer
NOTARY PUBLIC
Notary Public, State of New York
No. 3.
Qualified in
Commission Exp. 1973

The Beame Plan: Slash 380M in Fiscal '77

By MARK LIEBERMAN

Mayor Beame's new budget proposal will slash an estimated $380 million from city spending for the fiscal year beginning July 1 as part of a two-year proposal for budget cuts to eliminate a deficit of $821 million, City Hall sources said yesterday.

The mayor will deliver a budget message to a joint meeting of the Board of Estimate and City Council at City Hall today and the figures are expected to add further to the austerity under which New Yorkers have lived since the mayor took office in 1974.

The plan to be outlined by Beame today — one day before it is to be formally submitted to the watchdog Emergency Financial Control Board — delays most of the required economies until the last year of the city's three-year fiscal plan.

But the plan for 1976-77 will include:

- The elimination of 6,000 jobs in mayoral agencies, including the Police, Fire and Sanitation departments, with 1,500 firings anticipated. The police are expected to lose 300 jobs and the Fire Department up to 100. Beame hopes that most of the jobs can be eliminated through attrition.
- "Substantial" cuts in dollar appropriations to independent agencies such as the Board of Education and Health and Hospitals Corp., although the number of job cuts is not specified in the mayor's proposal. "History has shown that when they apply the dollar cuts, jobs go," one budget official said.
- Slashes of more than $70 million in social programs such as welfare, drug abuse control and mental health services.

The cuts to be outlined by the mayor, sources said, will not follow a percentage formula.

The agency cuts will range from a fraction of a percentage to more than 30%, with the essential services required to take the smaller cuts.

"The cuts were applied on the basis of the agency's ability to absorb them," an aide to Budget Director Donald Kummerfeld explained.

The mayor already has indicated that cuts for the 1977-78 fiscal year will include $125 million representing the total city funding for the senior colleges in the City University and $50 million based on the city's proposed withdrawal from the federal Social Security system. Albert Shanker, president of the United Federation of Teachers, who met with Beame yesterday at City Hall, said that his union might seek to offset Social Security losses through future collective bargaining.

High Court Grants Blacks Retroactive Job Seniority

By LESLEY OELSNER

Special to The New York Times

WASHINGTON, March 24—In a landmark civil rights ruling, the Supreme Court decided today, 5 to 3, that blacks who were denied jobs in violation of the Civil Rights Act of 1964 must be awarded retroactive seniority once they succeed in getting those jobs.

The blacks must be given the same seniority they would have had if they had been hired initially, the Court said, with all accompanying rights, including pension benefits and, in the event of layoffs, better job security than that possessed by workers with less seniority.

Whites Affected

Some white employees will now have less seniority and job protection than previously. These employees are whites who were hired after the blacks' initial job applications, but before the blacks were put on the job.

In another case, the Court, drawing a sharp distinction between the rights of civilians and those of military personnel, held that a member of a military service had no right to be defended by a lawyer at a summary court-martial, even though the court-martial might result in as much as 45 days' confinement. [Page 29.]

The ruling on the rights of blacks in jobs appears to assure the same rights to women who were discriminated against on the basis of sex, and to others, for it describes the type of relief that Federal courts should order in cases based on

Continued on Page 29, Column 1

Court Grants Retroactive Job Seniority

Continued From Page 1, Col. 1

Title 7 of the Civil Rights Act. That act prohibits discrimination in employment because of race, religion, sex or national origin.

The ruling does not mean that every minority member or woman who is newly hired by a company that once discriminated can get retroactive seniority. The person must prove in Federal Court that he or she was denied the job because of unlawful discrimination after Title 7 went into effect.

The ruling today said that if a person established this in a lawsuit that he or she had brought against the employer based on Title 7, and if there was a seniority system, the court must ordinarily award retroactive seniority. The Justices said that the trial court could decline to do so only if this would not obstruct the purpose of Title 7 in providing redress for discrimination.

The decision leaves unanswered the question whether retroactive seniority is to be awarded to a person who was denied a job on the basis of race or sex before the enactment of Title 7 or to a person who did not initially apply for a job because it was well known in the community that the employer did not hire blacks.

The ruling, with three Justices dissenting, appears to support the general concept of "affirmative action" as a means of remedying discrimination.

More specifically, it strengthens Title 7's provision for affirmative action as a remedy in discrimination cases. Several lower Federal appeals courts had previously held that this provision did not require the granting of retroactive seniority.

The ruling also firmly established, as the Court noted, that whites must share with blacks "the burden of the past discrimination" in employment, as they already must do in schools.

The ruling was the Court's first on so-called reverse discrimination, a condition said to exist by some whites and men who feel that they are being forced to give up rights in favor of minorities or women.

The employer in the case on which the Court acted today had argued that retroactive seniority should not be required, because it would conflict with the rights of other employees. In similar cases in the lower courts, some unions have made the same arguments.

The three dissenters agreed, saying that retroactive seniority that gives new employees a "competitive" edge over the employees who were not discriminated against should not automatically be awarded. Chief Justice Warren E. Burger said in a separate opinion, "I cannot join in judicial approval of 'robbing Peter to pay Paul.'"

The majority ruled, however, that in most cases retroactive seniority was necessary to accomplish the two basic purposes of the Civil Rights Act: to restore individuals who had been unlawfully discriminated against to the place they would have achieved if they had not been discriminated against, and to end discrimination.

Basis of Ruling

The Court suggested that the effect of the ruling on the employees who were not discriminated against might be less than it first appeared, because only a few of those denied jobs might end up getting those jobs and the special seniority.

The Court based its ruling on the language of Title 7, and on the importance of the seniority system. It reasoned that a seniority system could perpetuate the effects of past discrimination by continuing to give the victims of that discrimination fewer privileges than the nonvictims received.

"Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation," the majority said.

Seniority systems have been under attack by civil rights groups for years, with the attack increasing as national economic difficulties have led to layoffs and, under the last-hired first-fired principle, loss of newly won jobs by minorities and women.

Today's ruling was a substantial victory for the civil rights groups.

Jack Greenberg, director of Educational Fund Inc., which argued the winning side of today's case, said that the ruling "assures that black victims of racial discrimination will be put in their rightful place."

The case, which involved racial discrimination by a trucking concern in Georgia, was Franks V. Bowman, No. 74-728.

The Court's opinion was written by Justice William J. Brennan Jr. Joining him in the majority were Justices Potter Stewart, Byron R. White, Thurgood Marshall and Harry A. Blackmun.

Dissenting, in addition to Chief Justice Burger, were Lewis F. Powell Jr., who wrote the main dissenting opinion, and William H. Rehnquist. Justice John Paul Stevens did not participate.

UNITED STATES DISTRICT COURT
CHAMBERS OF
SYLVESTER J. RYAN
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK 7, N. Y.

March 25, 1976.

Puerto Rican Legal Defense &
Education Fund, Inc.,
95 Madison Avenue,
New York, N.Y. 10016.

Attention of Kenneth Kimerling, Esq.

Re: Guardians Association v. Civil
Service Com. 72 Civ. 928

Gentlemen:

Your letter of March 24, 1976 (PY [illegible]) and the within Order to Show Cause in the above entitled matter are returned herewith.

As you were advised by the Clerk's Office, this is a closed action. On December 28, 1973, a true copy of the mandate with a copy of the opinion was filed in the Clerk's Office and the mandate states that the judgment of the District Court was affirmed.

If you feel you need further relief, you may, of course, commence a new action.

Very truly yours,

Anne Wren

Secretary to Judge Ryan.

Enclosure.

EXHIBIT E

1 CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005

April 8, 1976

Honorable Sylvester J. Ryan
United States District Judge
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Guardians Association v.
Civil Service Commission,
72 Civ. 928

Dear Judge Ryan:

I am writing to confirm my telephone conversation with your secretary today about the captioned case. As you know, counsel for plaintiffs in this action take the position that the case has not been terminated. However, because of time urgency, we are proceeding to file a new complaint dealing with the questions of seniority and related matters.

Respectfully yours,

s/Christopher Crowley

Christopher Crowley

cc: Paula Omansky, Esq.
Phillips Nizer Benjamin Krim & Ballon
Kaye Scholer Fierman Hays & Handler
Eddie Aponte, Clerk

EXHIBIT G

85sa

POLICE CIVIL SERVICE SELECTION PROCEDURES IN NEW YORK CITY:

COMPARISON OF ETHNIC GROUPS

Jan M. Chaiken Bernard Cohen

R-1289-NYC

May 1973

THE
NEW YORK CITY
RAND
INSTITUTE

545 MADISON AVENUE NEW YORK NEW YORK 10022 (212) 758-2214

EXHIBIT H

The New York City-Rand Institute is a nonprofit research institution founded, as its Articles of Incorporation state, "... primarily to conduct programs of scientific research and study, and provide reports and recommendations, relevant to the operations, planning or administration of the City of New York." The Institute was established in 1969 by the City of New York and The Rand Corporation as a center for the continuing application of scientific and analytic techniques to problems of urban life and local government. It is governed by a Board of Trustees appointed jointly by the City and Rand.

87sa

POLICE CIVIL SERVICE SELECTION PROCEDURES IN NEW YORK CITY:

COMPARISON OF ETHNIC GROUPS

Jan M. Chaiken Bernard Cohen

R-1289-NYC

May 1973

This study was sponsored by the City of New York and the Fund for the City of New York. Its contents, however, do not purport to represent the official views or policy of the sponsors.

THE
NEW YORK CITY
RAND
INSTITUTE

545 MADISON AVENUE NEW YORK NEW YORK 10022 (212) 758-2244

Rand

SUMMARY

CONTEXT AND PURPOSE OF THE STUDY

The attorneys for both sides in a lawsuit retained The New York City-Rand Institute to conduct an independent, impartial analysis of the civil service examination scores of white and minority-group applicants for the position of patrolman in the New York City Police Department and the effect of the written examination, as compared to other parts of the appointment process, on the number of men appointed from each ethnic group. The plaintiffs in this case, the Guardians Association and the Hispanic Society, have alleged that the written entry-level civil service examination and other parts of the appointment process discriminate unlawfully against blacks and Hispanics. The defendants are the New York City Civil Service Commission, the Department of Personnel, and the Police Department.

Applicants who take the civil service examination are not asked to state their race or ethnicity on the application form or the examination paper. Therefore, neither the plaintiffs nor the defendants were able to determine whether, in fact, minority-group applicants score lower than whites on the written examination and are less likely than whites to survive subsequent steps in the appointment process. The Institute was requested to collect such information as was needed to determine the examination scores and progress through the appointment process for Hispanics, blacks, and non-Hispanic whites, leaving the question of whether the results indicated racial discrimination to be resolved by the legal process.

Two examinations were selected for analysis. One of them, given in 1970, was the most recent examination for the position of patrolman when our study began (in November 1972). The other, given in 1968, was the oldest exam with the property that some men who passed it were still awaiting appointment. In all, 10,321 men took these two examinations.

DATA SOURCES

To conduct the study, the Institute collected data about the subjects from several sources. The New York City Department of Personnel

provided names, addresses, exam scores, and other information unrelated to the ethnicity of the examinees. The Police Department provided available information concerning the progress of each subject through the appointment process and, for the purposes of this research, the Department determined the race or ethnicity of those subjects who reached the step of submitting a detailed application form with a photograph and fingerprint card. In addition, the Institute mailed questionnaires to the subjects asking them their ethnicity, and a sample of those who did not respond to the questionnaire was contacted by telephone.

Other sources of information used in the study included a list of Spanish surnames prepared by the Census Bureau, which we matched against the names of the subjects, and 1970 census data for the tracts in which the subjects lived.

Each source of data about the racial/ethnic classification of the subjects had certain shortcomings, but when all of them were used together, accurate estimates could be made. The data from the Police Department, although highly accurate, was limited in that the Department had no information for those subjects who failed the written examination or for half of those who passed. The number of subjects whose race could be determined by their responses to the questionnaire was limited by the fact that approximately 20 percent of them had moved and were not reached by mail, while only one-fourth of the remainder answered the questionnaire. Moreover, the men who did respond were found not to be typical of the total group; minority-group members had a higher response rate than whites.

The reverse was true of the data collected by telephone; a larger proportion of minority-group members than whites were unreachable by telephone, either because they had moved or because they did not have a telephone number listed in their name. The surname match was a useful, but not perfect, method of identifying Hispanics, since the names of some Hispanics do not appear on the Census Bureau's list, while the names of some persons who belong to other ethnic groups are the same as Spanish surnames. Finally, data concerning the racial composition of each age group within census tracts proved to be a highly reliable source of information about the ethnicity of subjects, but computerized matching

of subjects' addresses to 1970 census tracts was not available for one of the five boroughs of New York City or for addresses outside the City. Therefore, the full analysis based on census data was performed for only four boroughs.

FINDINGS

The Examinees

The analysis showed that about 71 percent of those who took each examination were "white" (that is, neither black nor Hispanic). Of the remaining 29 percent, who were minority-group members, slightly over half were black for the 1970 exam, while nearly two-thirds were black for the 1968 exam.

Considering only those men who were New York City residents, the fraction of applicants who were black was approximately the same as the fraction of males aged 16-34 in the City who are black. However, the proportion of applicants who were Hispanic was slightly lower than their proportion of the population. Applicants from outside the City were predominantly white (over 90 percent).

Scores on the Written Examination

In all, 57.5 percent of those who took the 1968 examination passed. We estimated that about 66 percent of white examinees passed the written test, about 36 percent of blacks passed, and 30 to 40 percent of Hispanics passed (depending on the data source used for the analysis). Moreover, among those who passed, the minority-group members scored lower than whites and were therefore ranked lower on the eligible list.

The 1970 examination had a higher overall pass rate (72.9 percent). On this examination, about 83 percent of whites passed, between 45 and 55 percent of blacks passed, and 45 to 50 percent of Hispanics passed. Aside from the fraction of examinees who passed, the distributions of grades for each ethnic group on the 1970 examination were statistically indistinguishable from those on the 1968 examination.

Statistical tests showed that the scores of blacks were not significantly different from those for Hispanics, while the differences in

scores between whites and minority-group members were highly significant. Statistically, there was less than one chance in a billion that the observed differences among the exam score distributions for whites, blacks, and Hispanics could have occurred if grades had been randomly distributed among the examinees, independent of their race.

The analysis therefore confirmed the plaintiffs' allegations that minority-group members are less likely than whites to pass the written examination and are ranked lower than whites on the eligible list. Moreover, there was no way the passing grade on either examination could have been established to result in equal proportions of whites and minority-group members passing the test. These findings are being presented to the Court for its determination of whether they are indicative of racial discrimination.

Applicants who pass the written test are entitled to have five points added to their examination grade if they are veterans and another five points if they are disabled veterans, thereby raising their ranking on the eligible list. Although the effect of the added points on individual examinees' rankings can be very large (as much as half the distance from the bottom to the top of the list), veterans' credits were found to make only a minor change in the relative rankings of minority groups as a whole, compared to whites. The effect was a slight relative increase in the rankings of blacks and Hispanics, reflecting the fact that more minority-group applicants than white applicants were veterans. For example, on the 1970 examination the average raw score for whites who passed was 3.1 points higher than for blacks and Hispanics, but when veterans' credits were included in the grades the difference decreased slightly to 2.6 points.

Progress through the Appointment Process

No significant differences between whites and minority-group members were found in the proportions of passing examinees who appeared for their physical-medical exam or in the proportions who passed the physical. Blacks who pass the physical were found to be slightly less likely than whites or Hispanics to complete and submit their detailed application form (PA-15), but the differences were not statistically significant.

Among those who submitted their PA-15 after passing the 1968 examination, no significant differences were found in the proportions of whites, blacks, and Hispanics who were appointed to the police force. (For the 1970 examination, *none* of the men who passed had been appointed prior to the date of this report.) A significantly higher fraction of minority-group members than whites were rejected or termed "uncooperative" by the Police Department's background investigators, but these differences were counterbalanced by the fact that a larger fraction of the whites withdrew their applications. The plaintiffs in the lawsuit alleged that the attitude of the background investigator and his treatment of the candidate would cause larger proportions of minority-group than white candidates to withdraw, but the data collected for this one examination did not support the allegation.

On balance, none of the procedures which followed passing the 1968 examination was found to have an appreciable effect on the fraction of blacks, whites, and Hispanics eventually appointed. Therefore, the proportions of each recruit class that are white, black, or Hispanic are about the same as the proportions among the men who pass the written examination. We conclude that the primary explanations for the fact that Police Department recruit classes contain a smaller fraction of blacks and Hispanics than the City population are

- ten to fifteen percent of applicants reside outside New York City, and few of them are black or Hispanic,
- City Hispanics are slightly less likely than others to apply to become policemen, and
- blacks and Hispanics fail the written entry-level civil service examination to a greater extent than whites.

Subsidiary Findings

The methods used to analyze the data automatically produced some interesting results that were not specifically related to the questions posed by the attorneys in connection with the lawsuit.

When the subjects were divided according to their borough of residence, applicants from Queens were found to perform better on the written

examination than their counterparts of the same race from other boroughs. Black applicants from Manhattan scored substantially lower than blacks from elsewhere, and white applicants from Brooklyn had lower grades than whites from other boroughs. Non-City residents appear to have performed about the same as City residents of the same race.

When the subjects were divided by age, the blacks were found to be oldest (averaging 22.7 years), the Hispanics next (21.6), and the whites youngest (20.7). Older examinees performed somewhat better on the written examination than young ones, so the ages by race do not help explain the lower scores of blacks and Hispanics.

GENERAL CONCLUSIONS

The striking similarities found in the examination score distributions by race for one 1968 group of examinees and one 1970 group suggest that other examinations given in New York between 1968 and 1970 would, if analyzed, show the same general patterns. However, from the limited information used in this study (in particular we did not inspect any of the examination questions or collect any data concerning the background of applicants), we cannot draw any conclusions as to whether future civil service examinations in New York, or any examinations in other cities, are likely to have larger proportions of whites passing than minority-group members passing.

In addition, the Institute was not asked to determine whether the police appointment process in New York, or any part of it, is racially discriminatory, and our results are not, by themselves, adequate to answer this question. This Report will form only one part of the evidence presented to the Court for the purpose of resolving the issue of discrimination.

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CONTENTS

SUMMARY iii

ACKNOWLEDGMENTS ix

LIST OF FIGURES xii

LIST OF TABLES xiii

Section

I. INTRODUCTION 1
- Context and Purpose of the Study 1
- Legal Background 2
- Outline of this Report 5

II. THE APPOINTMENT PROCESS 6
- Filing Application 6
- Taking Examination 7
- Grading the Examination 7
- Physical Examination 9
- Completing the PA-15 Form 10
- Background Investigation 11
- Appointment 12

III. RESEARCH METHODOLOGY 14
- Definitions and Terminology 14
- Data Sources Used 15

IV. FINDINGS 25
- The Examinees 25
- The Written Examination 27
- Progress Through the Appointment Process 46
- Outcome of the Background Investigation 49
- Geographical Characteristics 52
- Performance on the Written Exam by Age 61

Appendix

A. DATA FROM DEPARTMENT OF PERSONNEL 65
B. DATA FROM THE NEW YORK CITY POLICE DEPARTMENT 66
C. QUESTIONNAIRE SURVEY 72
D. ANALYSIS USING CENSUS DATA 80
E. SAMPLE DESIGN 85
F. THE TELEPHONE SURVEY 91
G. SUPPLEMENTARY TABLES 98
H. DATA FILES 102

REFERENCES 107

FIGURES

1. Cover Letter for Questionnaire 17
2. Questionnaire Postcard 18
3. Exam Score Distribution: Exam #0013 32
4. Exam Score Distribution: Exam #8046 37

TABLES

1. Appointment Process for All Subjects 13
2. Composition of Examinees by Race and Ethnicity 26
3. Questionnaire Respondents by Race 27
4. Estimated Racial Composition of Deciles: Exam #0013 29
5. 95% Confidence Intervals for Score Distribution: Exam #0013 30
6. Estimated Racial Composition of Deciles: Exam #8046 35
7. 95% Confidence Intervals for Score Distribution: Exam #8046 36
8. Score Distributions from PD and Questionnaire Data Only: Exam #8046 39
9. Score Distribution for Hispanic Surnames: Exam #8046 40
10. Score Distributions from PD, Questionnaire, and Hispanic Surname Data: Exam #0013 41
11. Score Distributions from Census Data: Exam #0013 43
12. Score Distributions from Census Data: Exam #8046 45
13. Appointment Process by Race: Exam #8046 47
14. Appointment Process by Race: Exam #0013 48
15. Appointment Process, Hispanic Surnames 49
16. Outcome After PA-15 Submitted, by Race 51
17. Residence of Examinees 54
18. Residence of Examinees by Race: Exam #8046 55
19. Residence of Examinees by Race: Exam #0013 55
20. Census Counts of Males Aged 16-34 56
21. Score Distributions from Census Data, Four Boroughs Separately: Exam #0013 58-59
22. Score Distributions: Subjects Residing in Staten Island or Outside NYC 60
23. Age Distribution of Subjects: Exam #0013 62
24. Average Score by Age: Exam #0013 63
B-1. Score Distributions from PD Data Only: Exam #0013 69
B-2. Score Distributions from PD Data Only: Exam #8046 70
C-1. Response Rate for Questionnaires 73
C-2. Response Rates by Race 75
C-3. Response Rates: Hispanic Surnames 76

C-4. Score Distributions from Questionnaire Data Only: Exam #8046 77

C-5. Score Distributions from Questionnaire Data Only: Exam #0013 78

E-1. Strata Characteristics: Exam #8046 87

E-2. Strata Characteristics: Exam #0013 88

F-1. Data from Telephone Calls: Exam #8046 94

F-2. Data from Telephone Calls: Exam #0013 94

F-3. Final Data from Sample: Exam #8046 96

F-4. Final Data from Sample: Exam #0013 97

G-1. Table 4 with Row Percentages 98

G-2. Table 6 with Row Percentages 99

G-3. Table 8 with Row Percentages 100

G-4. Table 10 with Row Percentages 101

I. INTRODUCTION

CONTEXT AND PURPOSE OF THE STUDY

The Guardians Association and the Hispanic Society, organizations of black and Hispanic policemen in New York City, have initiated a civil action in Federal District Court against the City's Civil Service Commission, Department of Personnel, and Police Department to prevent the future administration or use of "any test as a criterion for appointment or promotion...which has not been...validated...as accurately measuring the merit and fitness of candidates to perform the tasks of the position for which the test is being administered."(1) The complaint in this action alleges, among other things, that "the principal explanation for the low incidence of minorities in the NYCPD as a whole, and at higher grade levels in particular, is the racially biased character of the entry-level and promotional exams promulgated by the Civil Service System." In addition, the complaint alleges that the personnel screening procedure which follows passing the entry-level examination also discriminates against blacks and Hispanics.

Because the race and ethnicity of policemen are known to the Police Department, there is no difficulty in determining the relative performance of white and minority-group policemen on promotional examinations. However, the race or ethnicity of applicants to the Police Department has never previously been determined in a systematic fashion, so that no data were available to support or refute the factual assumptions underlying the portions of the complaint related to selection of patrolmen, namely, that minority members score lower than whites on the civil service examination and are less likely to survive the appointment process.

For this reason, the parties to this civil action retained The New York City-Rand Institute to determine the exam score distributions by race and ethnicity for two specified entry-level exams and to determine whether the written examination constitutes the primary factor influencing the racial composition of the ultimate appointees. These exams are number 8046, given in July 1968, and number 0013, given in May 1970. At the time we began this study in November 1972, some men who had passed

exam 8046 were still awaiting appointment to the Police Department; it was the earliest exam with this property. Exam 0013 was the most recent examination given for the position of patrolman.

This study has been conducted as an independent, impartial survey, and the results have been provided equally and simultaneously to the attorneys for both parties. It was therefore not within the scope of the study to address any of the legal issues in this case, in particular whether the appointment process for patrolmen in New York (or any portion thereof) is racially discriminatory. Instead, we have limited our attention to estimating certain numerical quantities which the attorneys felt would assist them and the Court in resolving the legal questions. Primarily, the attorneys wanted to know how many members of each racial/ethnic group took the written examinations, and what proportion of them passed. In addition, we estimated the number of applicants in each racial/ethnic group who were successful in completing the steps of the appointment process which follow passing the written examination.

LEGAL BACKGROUND

Across the country, there are in progress numerous legal challenges to existing civil service appointment and promotion procedures, not only for policemen but also for firemen, sanitation men, and other government employees. The only Supreme Court decision which is considered to be related to these lawsuits was the 1970 case of *Griggs vs. Duke Power Company*,[2] which did not involve the civil service system. In this case, a black laborer who worked as a coal handler for the power company requested transfer to a maintenance job inside the building. At the time, only whites held these inside positions. The company had established requirements for transfer of a high school education and passing an intelligence test, and Griggs was excluded by these requirements. In its ruling, the Court stated that the Civil Rights Act prohibited employers "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when:

(a) neither standard is shown to be significantly related to successful job performance;

(b) both requirements operate to disqualify blacks at a substantially higher rate than white applicants; and

(c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites."

In addition, the Court stated that "if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

The application of this ruling to other cases in which only whites held the positions in question was almost immediate. In 1971, a suit was brought against the Minneapolis Fire Department,[3] which at the time had no black, Indian, or Mexican-American employees. The Eighth Circuit Court of Appeals ruled, *inter alia*, that the written (civil service) examination for fire fighter could not be given until it had been validated by procedures commensurate with the Equal Employment Opportunity Commission Guidelines on Employment Testing. The Alabama State Police, which also had no minority-group officers, was enjoined a year later from continuing its employment practices, "including...examination..., for the purpose or with the effect of discriminating...on the ground of race or color."[4]

In instances where an employer has not had a history of total absence of minority-group employees, the legal issues are more subtle. In the case of *Chance vs. Board of Education of the City of New York*,[5] the District Court for the Southern District of New York ruled that statistical evidence can be used to demonstrate that "examinations and testing procedures...have the effect of discriminating against Black and Hispanic candidates." "However," the Court continued, "the existence of such discrimination, standing alone, would not necessarily entitle plaintiffs to relief." It is necessary to consider, in addition, "the question of whether the examinations under attack can be validated as relevant to the requirements of the positions for which they are given, i.e., whether they are 'job related.'"

The Court identified two relevant criteria for measuring test validity. The first is *content validity*, i.e., the examination must "elicit from the candidate information that is relevant to the job for

which it is given." The second is *predictive validity*, which is determined "by comparing the relative examination scores of successful candidates with their later performance on the job." In the suit against the Board of Education, the Court granted preliminary relief to the plaintiffs based on the finding that "although [the Board] has taken some steps toward securing content and predictive validity..., [it] has not in practice achieved the goal of constructing examination procedures that are truly job related."

These principles have been applied in subsequent cases involving police selection,(6) so that the primary issues in the present litigation are, first, whether statistical evidence indicates that significantly different proportions of whites as compared to minority-group members succeed at various stages of the appointment process; second, whether it is appropriate to interpret the observed differences in the statistics as demonstrating that racial discrimination exists; and, if so, third, whether the discriminatory aspects of the process are job related. In the present study, we examine only the first of these issues, leaving the other two to be resolved through the legal process. However, information obtained by us in a previous study(7) is related to the predictive validity of entry-level patrolman's civil service examinations administered in New York in 1956 and 1957.

Although the various court rulings in police selection cases have differed as to the type of evidence they have required, above and beyond a demonstration of statistically significant differences in success rates by race, to prove that discrimination exists, the distinction is illustrated by the ruling in *Castro vs. Beecher*:(6)

> ...[I]t is a fallacy to suppose that the Constitution entitles blacks to police selected like jurors as representatives of a cross-section of the community. Blacks have no more a constitutional right to a quota of black policemen than a quota of black judges or legislators or state-employed teachers. What blacks and other minorities have a right to is that public employees like policemen shall be selected by criteria that are significantly related to a job. If employees are so selected in good faith, it is from a constitutional angle wholly irrelevant that the result is that blacks get a percentage less than their percentage of the population. It is not constitutionally objectionable if under a selection system based on significantly relevant criteria, chosen and adhered

to in good faith, and administered fairly, 70% of those appointed are, let us say, of Irish ancestry, and only 3% are black.

OUTLINE OF THIS REPORT

In the next section, we discuss in some detail the process by which policemen are appointed in New York, focusing on those aspects which are relevant to the lawsuit by the Guardians and the Hispanic Society. In Section III we describe briefly the methods used to identify the racial/ethnic classification of the men who took the two examinations under study, with details separated into a series of appendices. The final section presents the findings of the study.

II. THE APPOINTMENT PROCESS

There are eight major steps normally followed in the process leading to appointment as a patrolman in the New York City Police Department. In order of occurrence they are:

1. Filing a brief application
2. Appearing for the written examination
3. Passing the written examination
4. Appearing for a physical-medical examination
5. Passing the physical-medical
6. Submitting a detailed application form (PA-15)
7. Being approved by the background investigator
8. Waiting for appointment.

In the descriptions of each step which follow, we emphasize those features which may have different effects on minority-group members as compared to whites. However, our findings in regard to the numbers of persons of each racial/ethnic group who survive each step are not presented until Section IV. Where the Guardians and the Hispanic Society have alleged that differential effects by race do in fact occur, we have indicated the nature of the allegation and, in some cases, the plaintiffs' arguments in support of the allegation. Quotations from the plaintiffs' complaint are given only for the purpose of clarifying the issues in question, and do not indicate that the authors agree with them. Indeed, the findings presented in Section IV will show that some of the allegations are confirmed by the data, while others are not.

FILING APPLICATION

The first step is to submit a brief application to take the written civil service examination. Each application form has a preprinted serial number. How many persons of various races submit these applications depends on the extent and nature of minority recruiting efforts, publicity given to the time and location of the examination, the relative attractiveness of a job as a policeman to eligible whites, blacks, and Hispanics, and a variety of other factors which have been explored in a previous Institute report.[8]

Some of the men who file these applications never actually take the examination. Although we did not collect data to determine the number of such men for exams #8046 and #0013, in general it is about one-third of those who apply. There is a possibility that the fraction of minority-group applicants who fail to appear for the exam is different from the fraction of whites, but the plaintiffs have not made any allegation in regard to this part of the appointment process.

TAKING EXAMINATION

The second step is to appear for and take the written examination, which is prepared and administered by the NYC Department of Personnel. For exam #8046, given on July 20, 1968, a total of 4055 men appeared, and for exam #0013, given on May 9, 1970, the number of examinees was 6266. The Department of Personnel provided the Institute with a list of the names, addresses, and other pertinent information about these men (see Appendix A), but of course no information about the race or ethnicity of the men was included. Our findings in regard to the racial composition of these two groups will be given in Section IV.

GRADING THE EXAMINATION

The third step is to pass the written examination, which requires a score of 75 or better. For exam #8046, 2333 men passed (57.5 percent); for exam #0013, 4569 men passed (72.9 percent).

The men who pass a given exam are ranked on an *eligible list* as follows:

- First, an "adjusted exam score" is obtained for each man by adding 5 points to the exam score of applicants who passed the exam and are military veterans, and an extra 5 points are added if the applicant is a disabled veteran.* If applicant A has a higher adjusted exam score than applicant B, then A ranks higher on the eligible list than B (i.e., his "list number" is lower).

*An applicant whose disability would interfere with police work will be disqualified in subsequent steps of the process.

- Second, if two applicants have the same adjusted exam score and the raw score for A is greater than the raw score for B, then A ranks higher on the eligible list than B.
- Finally, if A and B have the same raw and adjusted scores and A had the lower serial number on his application, then A is ranked higher on the list.

In principle, this procedure for breaking ties in the adjusted exam score is supposed to give preference to the men who submitted their applications earlier. However, inspecting the lists of examinees sequenced by application number indicated that the addresses are geographically clustered. This apparently reflects the fact that application blanks are provided in batches to the various locations at which an application form can be obtained; therefore a high application number does not necessarily indicate a late date of application.

Hence, the distribution by race of ranks on the eligible list depends on the following characteristics of each racial group:

- the distribution of raw exam scores,
- the fraction of veterans and disabled veterans,
- the distribution of application dates, and
- the serial numbers which happen to be on application forms in locations chosen by the group.

It is important to realize that veterans' credits and application numbers have a large influence on rankings, compared with the influence of the applicant's performance on the written exam itself. For exam #8046 we found that one man with a raw score of 82, who was a disabled veteran, had a list number of 823, while another applicant with the same raw score of 82 held list number 1789. Therefore, the difference between the highest-ranking person and lowest-ranking person with the same raw score on the written examination was 966 positions on the list. This is 41 percent of the distance from the top to the bottom of the list, which was the largest effect produced by both application number and veterans' credits for exam #8046.

For exam #0013 we observed that the highest-ranking subject with a raw score of 86 was listed as number 729, while the lowest-ranking man

with the same score had a list number of 3060. This constitutes a difference of 2331 positions (51 percent of the full range), which was the largest effect of veterans' credits and application number together for this examination.

Since the effects of application numbers are felt only when men have the same adjusted *and* raw score, they are more limited than the effect of veterans' points. On exam #8046, a total of 82 persons had a raw score = adjusted score = 96, so that the highest-ranked of these was 81 positions above the lowest-ranked. For exam #8046 this was the largest effect of application number alone.

On exam #0013, the single largest effect of application number only was 186 positions between the highest-ranked applicant with raw score = adjusted score = 94 and the lowest-ranked such man.

The plaintiffs in the lawsuit allege that blacks and Hispanics are less likely to pass the written exam than whites, and that those who do pass are disproportionately low on the eligible list. Our findings in regard to this will be presented in Section IV. We are not aware of any allegation related to differential effects by race of veterans' credits or application numbers.

PHYSICAL EXAMINATION

Those who pass the written exam are directed by mail to appear at a specified time and place for a physical and medical examination. Some of them fail to appear and are termed "uncooperative." Of the 2333 men who passed the 1968 written exam, 1610 (69.0 percent) appeared for the physical-medical. For the 1970 exam, 3079 (67.4 percent) of those who passed appeared for the physical-medical.

At the physical and medical examination, which is also administered by the Department of Personnel, certain requirements of law in regard to height and eyesight are checked, and a test of strength and agility is given. Those who fail this examination are termed "rejected." Seventy-seven percent of the 1968 examinees who appeared passed the physical-medical, and the same was true for 76.1 percent of those who appeared in 1970. The plaintiffs have not alleged that there are differences by race at this step of the process.

COMPLETING THE PA-15 FORM

Those who pass the physical and medical examination are handed a long application form, called the PA-15, by a representative of the Police Department. (For a copy of this form, see Ref. 8.) The next step is to return a completed PA-15 to the Police Department. Those who fail to return the form are termed "uncooperative." Of those subjects who passed the medical-physical, the number who submitted PA-15 forms was 1180 (95.1 percent) for exam #8046 and 2071 (88.7 percent) for exam #0013.

The plaintiffs in the present lawsuit allege that the PA-15 form asks many questions

> ...which have no reasonable bearing on the characteristics necessary to be a patrolman. The mere voluminousness and complexity of this questionnaire gives it a discriminatory character. Also discriminatory is the requirement that a candidate list, inter alia: all residences since leaving elementary school; all arrests and police investigations, including various "Youthful Offender" and juvenile investigations or arrests; a complete employment record; an employment disciplinary record; data as to paternity of children; divorces and the like.
>
> Members of Minorities in New York City tend to lead less settled lives than whites, to move more frequently, to become involved in brushes with the law more often and to change jobs more often. Accordingly, the mere task of completing this Form is far more burdensome for the typical Minority applicant than for the typical white applicant. In addition, Minority applicants are apt to be fearful that activities which are acceptable or normal according to Minority mores will be viewed with disapproval by white NYCPD screening personnel. Therefore, a disproportionate number of Minority applicants fail to complete and return Form P.A. 15.
>
> Form P.A. 15 demands the details of arrests of members of the applicant's immediate family and details of arrests of anyone residing with the applicant. Such questions discriminate against Minority applicants with ghetto backgrounds where arrests are more common, and are fundamentally unfair in that they tend to inhibit completion of Form P.A. 15 by applicants who have done nothing wrong themselves but happen to be related to or reside with persons who have been arrested.(1)

BACKGROUND INVESTIGATION

Upon receiving a filled-out PA-15, the Police Department conducts a background investigation of the applicant. If the form is not entirely complete, or if the applicant refuses to supply additional information which the investigator considers relevant, he may also be termed "uncooperative" at this stage. The background investigator may reject the applicant or approve his appointment, and a rejected applicant may appeal the decision to two review boards. To be certified for appointment as a patrolman, the candidate must be approved by the Police Department.

The plaintiffs allege that blacks and Hispanics are less likely than whites to survive this step. One plaintiff who has worked in the Police Department Personnel Bureau reported as follows:

> In my experience the character evaluations made by individual screening officers frequently reflect unfamiliarity with minority life styles and backgrounds. They may also reflect the peculiarities of the interviewers' own ethnic backgrounds, e.g., the attitude of Irish Catholic policemen to children conceived or born out of wedlock, common law marriages and incidence of venereal disease. Similarly, non-minority officers may be unduly concerned about the arrest records of other members of the applicant's family and various other things which would be familiar and understandable to a responsible member of the minority community. There are various background phenomena which do not reflect bad moral character on the part of the minority candidate, but they are alien and unacceptable to many white policemen who are unfamiliar with the minority experience.
>
> Many minority candidates withdraw from the application process merely because of the attitude of their screening officers. The screening officer has the power to intimidate or antagonize an applicant in countless small ways which, taken together, can result in dissuading or disillusioning the applicant and causing him to drop out of the screening process. The officer's tone of voice, his expression when asking questions about sensitive personal matters or the very way in which he hands papers -- or throws them down on the desk -- can have a strong deterrent impact on an inexperienced 21-year-old minority youth in a police station for the first time, especially if all the policemen he sees at the station are white.(9)

The results of the background investigation are available only for the earlier examination #8046 given in July 1968. The vast majority of persons who took the later exam #0013 in May 1970 had not been investigated at the time we collected the data for this study. The results of the background investigations for examination #8046 show that 552 of the men who submitted PA-15s were appointed to the force (46.8 percent) and 40 were rejected (3.4 percent); in addition, 213 men withdrew from the appointment process after submitting a PA-15 (18.1 percent), 131 of them were termed uncooperative (11.1 percent), and 242 cases were still pending at the time we collected the data for this study (20.5 percent).

APPOINTMENT

Approved candidates are appointed in order of their rank on the eligible list. The final step is to wait until all higher-ranking approved candidates (and all approved candidates from earlier lists) have been offered an appointment. Sometimes these lists expire before all the qualified applicants on the list have been appointed.* The complaint in the present civil action alleges that minority candidates are more likely to be at the bottom of the list and therefore that permitting lists to expire is itself discriminatory.

Table 1 summarizes the data depicting the appointment process for both examinations. Note that, aside from the substantial difference in the difficulty of passing the two exams, attrition at the various steps in the process was nearly identical in both exams. It is interesting to observe that for the 1970 exam a larger number of applicants were eliminated at steps subsequent to the written examination, either through their own failure to complete a step or by rejection, than were eliminated by failing the civil service test.

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*Ordinarily this would happen upon publication of a new list or after a statutory period of four years. However, at the present time, several patrolman candidate lists are active simultaneously due to litigation.

Table 1

APPOINTMENT PROCESS FOR ALL SUBJECTS

Step	Exam #8046				Exam #0013		
	Number		Percent of Preceding Step	Percent of Total	Number	Percent of Preceding Step	Percent of Total
	Known	Estimated[a]					
1. File application	Unknown	—	--	--	Unknown	--	--
2. Appear for exam	4055	—	--	100.0	6266	--	100.0
3. Pass exam	2333	—	57.5	57.5	4569	72.9	72.9
4. Appear for physical	1462	1610	69.0	39.7	3079	67.4	49.1
5. Pass physical	1092	1240	77.0	30.6	2343	76.1	37.4
6. Submit PA-15	1032	1180[b]	95.1	29.1	2071[b]	88.7	33.1
7. Background investigation							
Appointed	552	552	46.8	13.6	0	--	--
Rejected	37	40	3.4	1.0	4	0.2	0.1
Withdrew	161	213	18.1	5.3	10	0.5	0.2
Uncooperative	99	131	11.1	3.2	0	--	--
Pending	181	242	20.5	6.0	2057	99.3	32.8
Unknown	2	2	0.1	0.0	0	--	--

[a]For 173 men on exam #8046, the data did not show whether or not they appeared for the physical. Those who submitted a PA-15 were assumed to have passed; the remainder were termed "uncooperative" and were therefore assumed not to have appeared. These estimates do not affect the percentages by more than 2 percentage points.

[b]Some men submit a PA-15 without passing the physical. For exam #8046, a total of 1220 men submitted PA-15s; for exam #0013, there were 2081 men.

SOURCE: NYC Police Department records for each subject as of December 1972.

111a

III. RESEARCH METHODOLOGY

DEFINITIONS AND TERMINOLOGY

As described in previous sections, the subjects of this study are the 10,321 men who appeared for and took the civil service patrolman's exam number 8046 or number 0013.* The process of classifying subjects into racial/ethnic groups was complicated by the fact that honest differences of opinion can exist about the ethnicity of any particular individual. This is especially true for Hispanics, since there is no commonly accepted definition of this term. The plaintiffs have defined "Hispanics" to mean "Spanish-speaking persons who were born or who are descended from persons born in Puerto Rico, Cuba, or other Caribbean countries."(10) However, some persons who consider themselves Hispanic may not speak Spanish, while others speak Spanish but were born outside the Caribbean (e.g., in Mexico). Of necessity, we developed definitions of three racial/ethnic groups which were compatible with the data we would be able to collect. They were as follows:

- Hispanic. These are people who consider themselves Puerto Ricans, Cubans, or members of other Hispanic groups, or who state that Spanish was spoken in their home when they were children. When Hispanics are asked their race, they may respond "white," "black," or some other category.
- Black. These are people who consider themselves black, Negro, Afro-American, or of African heritage, *but who are not Hispanic*.
- White. We use this as a short expression for people who do not fall into the Hispanic or black categories. In the present context, nearly all of them would indicate their race as "white" or "Caucasian," but we include a few Orientals, American Indians, etc., whose success in the police appointment process, in comparison with whites, is not in question in the present lawsuit.

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*A small number of men (about 20) took both exams. They are counted twice as subjects of the study.

For each examination, the subjects were divided into *deciles* based on their raw scores on the written civil service examination. The first decile consists of the highest-scoring 10 percent of the examinees, the second decile of the next highest-scoring 10 percent, and so forth, down to the tenth decile which consists of the lowest-scoring 10 percent. By dividing the subjects in this fashion, we eliminated the effects of veterans' credits and application numbers on the relative rankings.

To simplify the presentation of our findings from the study, we allocated to each decile exactly 10 percent of the examinees, even if some men were tied for the score which separated one decile from another. Thus, for example, the lowest score in the first decile for exam #0013 was 94, and this was also the highest score in decile 2. A total of 241 men scored 94 on this exam, of whom 52 were randomly assigned to decile 1 and 189 to decile 2.* For exam #0013, all the men in deciles 1 to 7 passed the examination, along with 29 percent of those in decile 8. For exam #8046, all the subjects in deciles 1 to 5 passed the examination, along with 75 percent of those in decile 6.

Our primary objectives in the study were to estimate, for each exam, the composition by race and ethnicity of (a) each decile, (b) the group of examinees who passed, and (c) the total group of examinees. These numbers permit a determination of the exam score distribution for each of the three racial/ethnic groups. Secondary objectives were to estimate the racial composition of the groups surviving later parts of the appointment process (steps 3-7).

DATA SOURCES USED

The Police Department Records

Our first source of data was the New York City Police Department, which cooperated fully with the Institute and provided not only the race

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*To be precise, the subjects were sorted according to their exam score and the last digit of the serial number on their application form. Thus, in the example, those men who scored 94 and happened to have the last digit of their application number equal to 9 or 8 were assigned to the first decile. This is not the same as giving preference to men with high application numbers, as the full serial number has five digits.

of applicants, when known, but also the progress of each subject through steps 3-7 of the appointment process, whether or not his race was known. The methods by which these data were collected are presented in Appendix B, along with tabulations by race of the exam score distributions of men whose race could be determined from their PA-15 application.

After the data were collected from the Police Department, we knew the race of 31.4 percent of the subjects for exam #0013 and 28.9 percent of the subjects for exam #8046. Although the distributions in Appendix B are not necessarily typical of those for all the men who passed the exam, they do confirm the plaintiffs' allegations that minority-group members who submit a PA-15 are disproportionately low on the eligible list, compared to whites who submit a PA-15.

Questionnaire

Our second source of data was from a postcard questionnaire mailed in early December 1972 to nearly all the subjects of this study. The cover letter and a sample questionnaire are shown in Figs. 1 and 2. The first two questions on the postcard were for the purpose of determining the respondent's racial/ethnic classification, and the third was included so that we might analyze whether there were any differences among the groups in the extent to which they knew they had passed the exam.

Our analysis of the responses to this questionnaire is presented in Appendix C. In brief, we found that substantial numbers of the subjects were unreachable by mail because they had moved (25 percent in the case of exam #8046 and 13 percent in the case of exam #0013), and the response rate to the questionnaire by those who did receive it in the mail was only 20 percent for exam #8046 and 30 percent for exam #0013. Moreover, the response rate by minority-group members appeared to be substantially higher than by whites, so that the distribution of exam scores for respondents could not be considered as representative of the true distribution.

However, we had purposely mailed the questionnaire to all subjects, including those whose race was obtained from the Police Department, so that numerical estimates of the relative response rates for the three

Dear Sir:

We understand that you took a civil service entrance examination in 1970 for the position of patrolman in the New York City Police Department. There is a pending lawsuit which questions the legality of this examination. The suit alleges among other things that the examination discriminates against blacks and Hispanics. Both parties to the lawsuit have retained the New York City Rand Institute, an independent research organization, to analyze the examination.

To perform this work, the Rand Institute needs your cooperation in answering the three questions on the enclosed postcard.

Your response will be held in strict confidence and no individual will be identified in any way. The information will be used for statistical purposes only.

The Rand Institute needs to have responses from *everyone*, including those who may no longer want to become patrolmen and those who did not pass the test. Please return the postcard even if you have already given this information to the Police Department.

Your cooperation is vital, and we urge you to respond promptly.

Thank you for your cooperation in this matter.

Sincerely,

Attorneys for the Parties

Norman Redlich, Corporation
Counsel of the City of New York

Christopher Crowley

Fig. 1--Cover letter for questionnaire

Please check the appropriate squares.

1. Do you consider yourself

6-1 ☐ Black
6-2 ☐ Puerto Rican } 6-6
6-3 ☐ Other Hispanic } 6-7
6-4 ☐ White
6-5 ☐ Other_____

(Please give your race:
Oriental, American Indian, etc.)

2. Was Spanish spoken in your home when you were a child?

7-1 ☐ Yes
7-2 ☐ No

3. Did you pass the patrolman's exam mentioned in the letter?

8-1 ☐ Yes
8-2 ☐ No
8-3 ☐ Don't know

№ 14104

Fig. 2--Questionnaire postcard

racial/ethnic groups could be obtained. This was accomplished by determining the fraction of known whites who responded to the questionnaire as compared to the fraction of known blacks and Hispanics who responded. Since the relative response rates were not found to differ substantially by decile, it was possible to estimate the actual number of whites, blacks, and Hispanics in each decile by the following method.

First, a certain number of persons of each race were known to be in decile j by virtue of having been identified by the Police Department. Let

$N_1(j)$ = number of whites in decile j known to PD
$N_2(j)$ = number of blacks in decile j known to PD
$N_3(j)$ = number of Hispanics in decile j known to PD.

If we denote by $M_i(j)$ the number of persons of race i in the remainder of decile j (which we don't know), and by $m_i(j)$ the number of questionnaire respondents of race i in decile j *whose race was not known to the Police Department*, then

$$m_i(j) = r_i(j)M_i(j),$$

where $r_i(j)$ is the response rate for persons of race i in decile j who were not known to the Police Department. Now if $r_2(j)$ and $r_3(j)$ are assumed to be related to the white response rate $r_1(j)$ by ratios q_2 and q_3 which do not depend on the decile, we have

$$m_1(j) = r_1(j)M_1(j)$$

$$m_2(j) = q_2 r_1(j)M_2(j)$$

$$m_3(j) = q_3 r_1(j)M_3(j).$$

Once q_2 and q_3 have been estimated, it is possible to solve these three equations for $M_1(j)$, $M_2(j)$, and $M_3(j)$ by using the fact that their sum must equal the total number of persons in decile j whose race was not known to the PD. Adding the resulting estimate of $M_i(j)$ to $N_i(j)$

gives an estimate of the true number of persons of race i in decile j. The estimate we used for q_i was

$$q_i = \bar{r}_i/\bar{r}_1 \qquad (i = 2, 3),$$

where

$$\bar{r}_i = \frac{\text{number of respondents of race i known to the PD}}{\text{total number of subjects of race i known to the PD}}, \qquad i = 1, 2, 3.$$

Our results derived using this method will be given in Section IV. Although they depend on assumptions about response rates which cannot be verified directly, they have the desirable characteristic of being based exclusively on information received from the subjects themselves. This is not the case for the other methods which we will describe below. The racial/ethnic classifications of 47 percent of the subjects for exam #0013, and 40 percent of the subjects for exam #8046, were used in the calculation, based on PD and questionnaire data.

Hispanic Surnames

Our third source of information about the ethnicity of the subjects was a compilation of approximately 8000 Spanish surnames prepared by the U.S. Bureau of the Census. This list is used by the Census Bureau to tabulate the number of persons of Spanish surname in all parts of the country except New York, New Jersey, and Connecticut.

Each subject's last name was matched to the list, and in doubtful cases (e.g., a slight variant in spelling) the subject was included in the group with Hispanic surnames if his first name was clearly Hispanic. In this way, 753 subjects for exam #0013 and 365 subjects for exam #8046 were identified as having Hispanic surnames, and their distribution of exam scores was determined.

Matching a subject's name to the list is by no means a perfect method of determining whether he is Hispanic, since errors can occur in both directions. Some persons born in Puerto Rico or Cuba have surnames which are certainly not unique to Spanish-speaking people, and they are not identified by matching names. On the other hand, there

are some names on the Census Bureau's list (e.g., La Guardia) which may in fact be common among Hispanics but are also familiar names of Italians or other ethnic groups, and therefore some subjects are erroneously included in the group of subjects with Hispanic surnames. We attempted to minimize this type of error by inspecting the subject's first name, but it was not always possible to exclude non-Hispanics in this fashion. (This problem may explain why the Census Bureau does not tabulate counts of persons with Spanish surnames in the New York area.)

In a random sample of 785 subjects whose race was known from the Police Department or the questionnaire, 131 were identified as having Hispanic surnames. Of these, 107 proved to be Hispanic and 24 were not Hispanic. In addition, there were 24 men among the 785 who were Hispanic but did not have Hispanic surnames. Thus the true number of Hispanics in the sample was 131, exactly the same as the estimate; the two types of errors compensated for each other. We therefore believe that estimates of the number of Hispanics in a decile based on Hispanic surnames may be fairly reliable even though particular individuals were misclassified. In any event, our tabulations of persons with Hispanic surnames include all subjects who were positively identified as Hispanic by the Police Department or by their questionnaire response, unless the name was so clearly non-Hispanic as to cast doubt on the correctness of the previous classification. They do not include subjects positively identified as non-Hispanic.

Census Data

By virtue of residential segregation in the New York metropolitan area, there are many census tracts in which the population is close to 100 percent white or black. If one knows that at the time the 1970 census was taken an individual resided in a tract where there were no blacks or Hispanics of his age, then he can be positively identified as white even though no other information is available about him. If he resided in a tract of mixed population, the probability that he is white, black, or Hispanic can still be determined from census data, and this information, when combined with similar information about other individuals, can be used in a statistical analysis to estimate the exam score

distributions of the three racial/ethnic groups. Details of the statistical approach used in this study are given in Appendix D.

To perform this analysis, the Institute provided the Department of City Planning with a computer tape giving the addresses of all the subjects who resided in New York City. Using a computer program and data file developed by the City for the purpose of matching addresses to census tracts, election districts, etc., the Department was able to determine the 1970 census tracts for 79 percent of the subjects, and the 1960 census tracts for an additional 11 percent. For addresses in Staten Island, only the 1960 census tract was available.

The Institute processed 1970 census data for the New York SMSA to determine the number of male whites, blacks, and Hispanics in each census tract who were of age 16, 17, 18, 19, 20, 21, 22-24, 25-29, or 30-34. This processing involved adding estimated counts of Hispanics who are not Puerto Rican to Census Bureau tabulations of Puerto Ricans by sex and age, subtracting black Hispanics from the Census Bureau tabulations of blacks (which include black Hispanics) and subtracting the remaining Hispanics from the non-black population (to get the number of persons who are "white" by our definition).

The statistical procedure described in Appendix D was used only for subjects whose 1970 tract was provided by City Planning, and therefore our results based on census data analysis are available only for the four boroughs of Manhattan, Bronx, Brooklyn, and Queens. However, for a sample of subjects, the 1970 census tract was determined by hand if it was unavailable from the computer match, and this information was used as described on the next page.

Telephone Sample

Our final source of data was obtained for a sample of subjects whose racial/ethnic classification remained unknown after all Police Department and questionnaire data were in hand. Because our preliminary estimates indicated there would be substantial differences in the proportions of blacks and Hispanics in low as compared to high deciles, the sample was stratified by decile. Within each decile, the sample was chosen randomly.

The total sample size was 630 for exam #0013 and 649 for exam #8046. (See Appendix E for details of the sample design.)

We attempted to reach each of the sample subjects by telephone to ask him the same questions which appeared on the questionnaire postcard, and this succeeded for 43 percent of the #0013 sample and 40 percent of the #8046 sample. (See Appendix F for conduct of the telephone survey.)

In addition, if a sample subject lived in the New York SMSA (New York City, or Nassau, Suffolk, or Westchester counties) his 1970 census tract was determined even if it was not available from the computer matching, and he was classified as Hispanic if (a) his surname was Hispanic and (b) his tract contained at least one-third Hispanics in his age range, *or* if his tract contained over 90 percent Hispanics in his age range. The remaining subjects were classified as white (or black) if the proportion of the non-Hispanic population in their tract and age range which was white (or black) was over 90 percent.* By comparison with the data collected over the telephone, it was determined that no errors were made by this procedure for #0013 sample subjects whose race was identified in both ways, while three errors were made for #8046 sample subjects.**

Using these methods, it was possible to identify the race of an additional 38 percent of the #8046 sample and 46 percent of the #0013 sample, so that in total we knew the race of 83 percent of the sample subjects. We treated these subjects as if they constituted the totality of the sample and used standard formulas for stratified random samples to estimate, from the sample data, the number of whites, blacks, and Hispanics in the "unknown" portion of each decile*** and the variance

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*Nearly all of those classified in this fashion (87 percent) lived in tracts with 100 percent white or black in the indicated age range.

**The address provided on the application form by subjects who took exam #0013 was correct in early 1970, which coincides with the date of the census (April 1, 1970). But subjects for exam #8046 could have moved between 1968 and 1970, in which case they were not counted in the census of the tract corresponding to the address in our file. Therefore, the match by census tracts is inherently more accurate for exam #0013.

***I.e., the group of subjects in the decile whose race was not known from Police Department or questionnaire data.

of this estimate. These estimates were added to the number of known whites, blacks, and Hispanics in the decile.

This method of analysis is subject to a bias, or systematic error, due to the fact that the group of sample subjects whose racial/ethnic classification remained undetermined might contain a larger or smaller fraction of minority-group members than the rest of the sample. Although one can determine the maximum possible size of this error by assuming, on the one hand, that all of the unclassified sample subjects were white, and then, on the other hand, that all of them were black or Hispanic, we have not done so.

Instead, our research approach relies on comparing the results from this method of analysis with the results from the other methods described above. Each method is based on certain assumptions which might possibly be erroneous, but the assumptions underlying one method are entirely unrelated to those underlying another. Since we found that they all led to essentially the same conclusions, the magnitude of the maximum possible error of any one method is of little interest.

IV. FINDINGS

We now return to the various steps in the appointment process and describe the numbers of minority-group members at each step together with their performance as compared to whites. The greatest amount of detail will be given for the performance of the three racial/ethnic groups on the written civil service examination, since the primary purpose of the study was to determine the exam score distributions for each group, and several different methods were used in this part of the analysis.

At the end of this section, a few subsidiary findings will be given. These compare the exam grades of subjects according to where they lived and how old they were when they took the examination. Although the Institute was not requested to analyze the exam scores by residence and age, these results emerged automatically in the course of the analysis. They are of general interest and may also prove to be relevant to the lawsuit by the Guardians and the Hispanic Society.

THE EXAMINEES

Our estimates of the numbers of whites, blacks, and Hispanics who took the two examinations under study* are shown in Table 2. We have estimated the number of Hispanics who took each exam in three ways, and the number of whites and blacks in two ways. The first row of estimates for each exam in Table 2 is based primarily on data received directly from the subjects, although, as noted in Section III, we did use some census data in connection with identifying the race of some subjects in the telephone sample. The second row of estimates is based exclusively on census data for all subjects who were residents of Manhattan, the Bronx, Brooklyn, or Queens; for the remaining subjects the estimation procedure was the same as used for the first row.

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*The reader may be assisted in recalling which examination was given in 1968 and which one in 1970 if we point out that the first digit of the exam number corresponds to the last digit of the year.

Table 2

COMPOSITION OF EXAMINEES BY RACE AND ETHNICITY

Data Source	White		Black		Hispanic		Total
	Number	Percent	Number	Percent	Number	Per cent	
Exam #8046							
Estimates from PD, questionnaire, and sample data	2862	70.6	798	19.7	395	9.7	4055
Estimates from census data	2853	70.3	798	19.7	404	10.0	4055
Hispanic surnames	—	—	—	—	365	9.0	4055
Subjects of known race/ethnicity	1420	75.0	334	17.6	139	7.3	1893
Exam #0013							
Estimates from PD, questionnaire, and sample data	4481	71.5	967	15.4	818	13.1	6266
Estimates from census data	4421	70.6	967	15.4	878	14.0	6266
Hispanic surnames	—	—	—	—	753	12.0	6266
Subjects of known race/ethnicity	2332	72.4	479	14.9	411	12.8	3222

The estimates by all three methods can be seen to agree very closely, and the differences fall well within the range of statistical error, which is approximately 2 percentage points.* We can therefore be quite certain that about 71 percent of the examinees for both exams were white. The remaining 29 percent which consisted of minority-group members was divided among blacks and Hispanics differently for the two exams, with a larger proportion of Hispanics appearing for exam #0013 than for #8046. We note that minority recruiting efforts introduced by the Police Department between 1968 and 1970 do not appear to have affected the proportion of examinees who were members of minority groups. However, more people of all races were attracted to take the 1970 exam.

*Precise confidence intervals will be given below, in the discussion of exam score distributions.

Although we did not collect any data concerning the men who applied for these two examinations and then failed to take them, we do have a limited amount of information available for another examination from a previous study.[8] In 1969, the Institute mailed questionnaires to all the men *who applied for civil service examination #9019*, given on April 5, 1969, *but did not appear to take it*. The percentages of respondents who were white, black, or Hispanic are shown in Table 3, along with the corresponding figures for respondents to the questionnaires we mailed as part of the present study.

Table 3

QUESTIONNAIRE RESPONDENTS
(percent)

Group	Whites	Blacks	Hispanics
#8046 examinees	58.0	28.3	13.7
#0013 examinees	63.1	19.1	17.8
#9019 applicants who did not take exam	56.2	29.4	14.4

By comparison with Table 2, we see that the questionnaire respondents for exams #8046 and #0013 were not representative of the total group, and presumably the same was true for the 1969 questionnaire respondents. But the similarities in the breakdown by race for the three exams shown in Table 3 suggest that the men who apply and then fail to appear are black or Hispanic in slightly higher proportions than men who do appear. Therefore, we conclude that *minority-group applicants may be somewhat less likely to take the examination than whites, but the differences in the dropout rates by race do not appear to be very large*.

THE WRITTEN EXAMINATION

First Method: PD, Questionnaire, and Sample Data

Our results for the exam score distributions based on data from the Police Department, questionnaire respondents, and the telephone sample

are presented in two tables and a histogram for each examination. We begin with exam #0013, for which the findings are shown in Table 4, Table 5, and Fig. 3. Table 4 shows that approximately 82 percent of the white subjects passed the exam, as compared to about 55 percent of the blacks and 46 percent of the Hispanics.*

Looking at the estimated number of whites in each decile, we see that there is a nearly steady decrease as we go from the first to the tenth decile, the only exception being in decile 4. Correspondingly, the estimated numbers of blacks and Hispanics increase nearly monotonically from the top to the bottom decile. The differences in the number of minority-group subjects in the bottom as compared to the top deciles are very large; in fact, there are 7.8 times as many black and Hispanic subjects in decile 10 as there are in decile 1.

To see the extent to which the observed variations may be explained by possible errors associated with the fact that we sampled only a portion of the examinees to determine their race, we turn to Table 5, which shows the 95 percent confidence intervals for the distributions given in Table 4.** These intervals have the following interpretation: based on the size and stratification of our sample, there are only 5 chances in 100 that the true number of whites (or blacks, or Hispanics) lies outside the range shown. Thus, for example, we are 95 percent confident that the actual number of whites who took exam #0013 was between 4372 and 4586, and similarly we are 95 percent confident that the actual number of blacks was between 877 and 1054. In some cases, e.g., for Hispanics in decile 1, it will be noted that the lower limit of the confidence interval coincides with the estimate shown in Table 4. This means that there were no Hispanics in our sample of 35 subjects from decile 1, and yet even if there were as many as 54 Hispanics in the decile, there are 5 chances in 100 that a sample of 35 persons would contain no Hispanics.

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*Table G-1 in Appendix G presents the same data with percentages across the rows instead of down the columns.

**Intervals having higher levels of confidence, e.g., 99 percent, may be easily calculated from the ones given here. However, none of our conclusions would be substantively changed by adopting 99 percent confidence intervals.

Table 4

EXAM 0013

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	574	12.8	34	3.5	19	2.3	627	10.0
2	92-94	548	12.2	44	4.6	34	4.2	626	10.0
3	89-92	514	11.5	54	5.6	59	7.2	627	10.0
4	87-89	535	11.9	67	6.9	24	2.9	626	10.0
5	84-87	484	10.8	74	7.7	69	8.4	627	10.0
6	80-84	473	10.6	101	10.4	52	6.4	626	10.0
7	76-80	426	9.5	126	13.0	75	9.2	627	10.0
8	70-76	376	8.4	131	13.5	119	14.5	626	10.0
9	61-70	335	7.5	130	13.4	162	19.8	627	10.0
10	0-61	216	4.8	206	21.3	205	25.1	627	10.0
Pass	75-100	3670	81.9	527	54.5	372	45.5	4569	72.9
Fail	0-74	811	18.1	440	45.5	446	54.5	1697	27.1
Total		4481	100.0	967	100.0	818	100.0	6266	100.0
Average score		84.9		75.3		73.0		81.8	

NOTE: Counts and percents are subject to sampling errors as shown in Table 5.

Table 5

EXAM 0013

95% CONFIDENCE INTERVALS FOR ESTIMATES
OF EXAM SCORE DISTRIBUTION

Decile	Whites		Blacks		Hispanics	
	Number	Percent	Number	Percent	Number	Percent
1	552- 590	12.0-13.5	18- 56	1.7- 6.3	19- 54	2.1- 7.3
2	522- 573	11.4-13.1	27- 65	2.6- 7.4	23- 52	2.6- 7.0
3	480- 549	10.5-12.6	33- 78	3.1- 8.9	32- 87	3.6-11.7
4	507- 564	11.1-12.9	37- 96	3.5-10.9	24- 56	2.7- 7.5
5	457- 511	10.0-11.7	53- 94	5.0-10.7	50- 90	5.6-12.1
6	442- 504	9.6-11.5	73- 129	6.9-14.7	41- 68	4.6- 9.2
7	394- 457	8.6-10.4	98- 155	9.3-17.7	60- 94	6.7-12.7
8	333- 418	7.3- 9.6	97- 166	9.2-18.9	84-153	9.4-20.6
9	290- 373	6.3- 8.5	98- 162	9.3-18.5	126-199	14.1-26.8
10	174- 300	3.8- 6.8	167- 244	15.8-27.8	136-274	15.2-36.9
Pass	3580-3760	78.1-86.0	447- 607	42.4-69.2	316-428	35.3-57.7
Total	4372-4586	100.0	877-1054	100.0	742-896	100.0

The ranges of percentages shown in Table 5 were derived by dividing the *smallest* number in the 95 percent confidence interval for a decile by the *largest* number in the interval for the total to give the lower percentage, and similarly for the higher percentage. Thus, for example, looking at whites in decile 1, 552 divided by 4586 is 0.120, and 590 divided by 4372 is 0.135. Using this procedure, we assure that the chances are no more than 5 in 100 that the true percentage lies outside the range shown, while an exact calculation would show that the chances are even less than this.

We see from the table that there is no overlap between the 95 percent confidence interval for the percent of whites who passed the exam and the interval for the percent of blacks who passed. Therefore, it is very unlikely that the observed differences are due to sampling error. *In short, we conclude that a larger proportion of whites than blacks passed the exam. The evidence is even stronger that a larger fraction of whites than Hispanics passed the exam. Therefore, our findings for exam #0013 support the plaintiffs' allegations in regard to the relative pass rates for whites and minority-group members.*

We may also state with 95 percent confidence that the fraction of whites who scored in decile 1, 2, 3, or 4 was higher than the fraction of blacks who scored in the corresponding decile, while the fraction of whites who scored in decile 9 or 10 was lower than the fraction of blacks in the decile. On the other hand, the confidence intervals for the percent of blacks in each decile overlap to a considerable extent the confidence intervals for the percent of Hispanics, and therefore there is no good reason to distinguish the distributions for these two groups.

In presenting the distributions by decile graphically in Fig. 3, we have combined the blacks and Hispanics into a single group. The height of the dotted bar corresponding to the percent of whites in each decile in this figure is the same as the numerical entry for whites on Table 4, and the black line (I) at the top of the bar represents the 95 percent confidence interval for whites from Table 5. The cross-hatched bars on the figure corresponding to the percent of blacks and

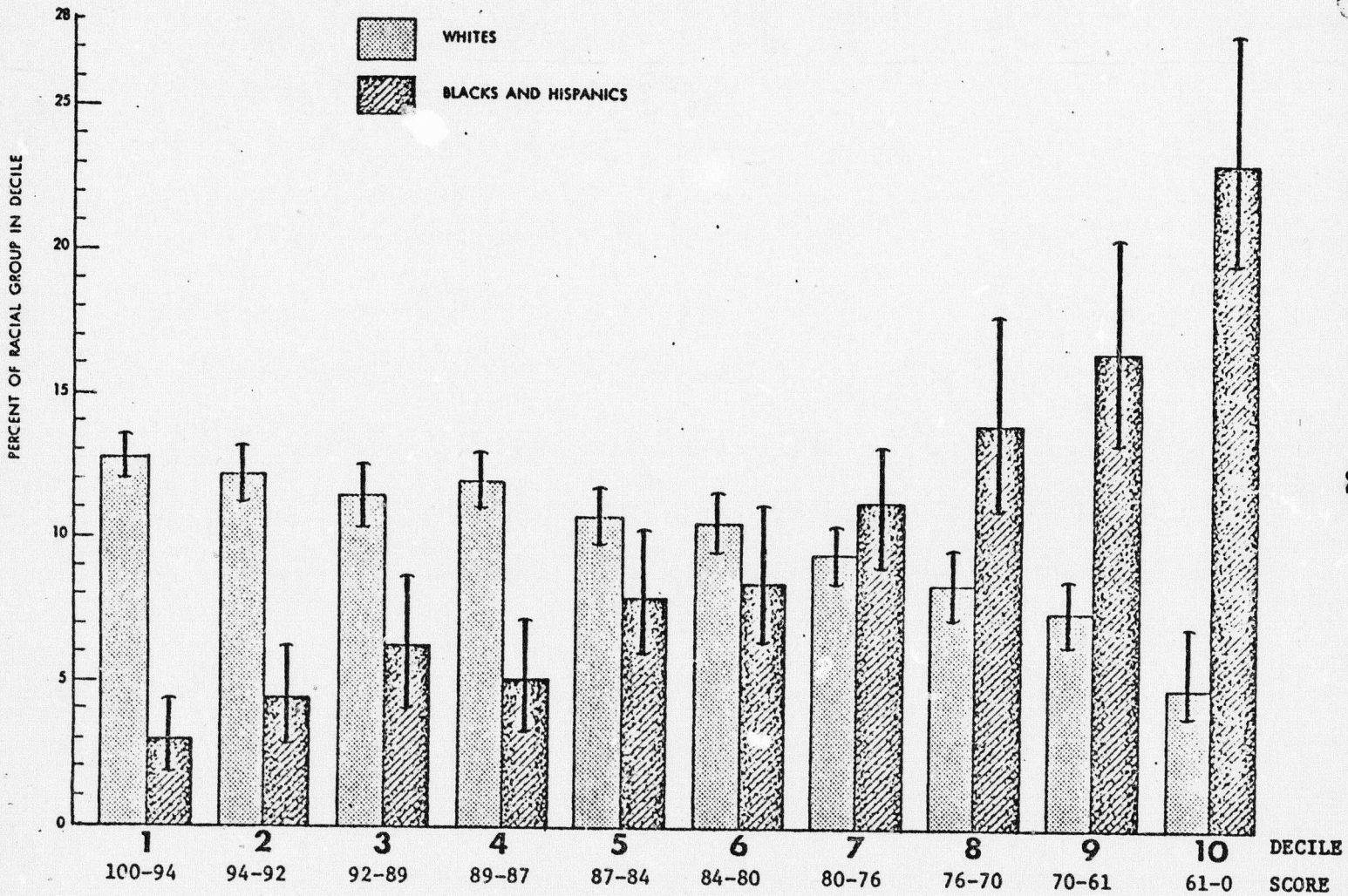

Fig. 3--Estimated exam score distributions and 95% confidence intervals for exam #0013

130sa

Hispanics, on the other hand, are not drawn directly from the numerical entries on the tables, although they are based on exactly the same data. They represent percentages for the sum of blacks and Hispanics, which in general have smaller ranges of error than the percentages for either subgroup taken separately. When the results are displayed visually in this fashion, there can be little doubt that the distribution of exam scores for whites is dramatically different from the distribution for blacks and Hispanics. Indeed, it can be seen that the passing grade for this examination could have been established at any point whatsoever, and there still would have been a larger fraction of blacks and Hispanics who failed than whites who failed.

In cases such as this, where the distributions are evidently different by inspection of the histogram, it is somewhat gratuitous to calculate statistical measures of the probability that the distributions are in fact the same. Nonetheless, to dispel any doubts about the strength of the disparities that might arise if we omitted such measures, we have performed a test to determine the probability that the observed distributions by race could have occurred if each subject had been randomly assigned to a decile, independent of his race.* We wish to emphasize that this test is *not* a simple chi-square statistic for the counts shown in Table 4, since these counts are not known to be correct but are merely estimates.**

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*That is, we imagine that 627 men were chosen randomly to be in decile 1, 626 to be in decile 2, etc., and determine the probability that the distributions would be at least as different as the observed ones.

**A simple example may clarify this point. Suppose that 20,000 people, half of them males and half females, are divided into two equal groups. We take a sample of 20 from group 1, and find 9 males and 11 females. If we test the null hypothesis that males were as likely to be assigned to group 1 as females, using the sample data, we will not reject the hypothesis. However, our *estimate* of the number of males in group 1 is 4500 and our *estimate* for females is 5500. If we were to perform a test using these estimates, we would reject the null hypothesis, but this would not be warranted by the data.

Under the null hypothesis that subjects were assigned randomly to deciles, the expected number of whites in each decile would not vary from one decile to another, and we can call it A_1.* Similarly, the expected number of blacks [Hispanics] would be A_2 [A_3]. Now if n_{ij} is the number of subjects of race i known to be in decile j by virtue of Police Department and questionnaire data, then the expected number of race i people in the telephone sample for decile j is $e_{ij} = f_j(A_j - n_{ij})$, where f_j is the fraction of the unknowns in the sample. Letting m_{ij} be the actual number of race i subjects found in the sample for decile j, the test statistic, having 18 degrees of freedom, is

$$\chi^2 = \sum_{i=1}^{3} \sum_{j=1}^{10} \frac{(m_{ij} - e_{ij})^2}{e_{ij}}.$$

Now the correct A_1, A_2, and A_3 to enter into this statistic are not known, except that we must have $A_1 + A_2 + A_3 = 627$.* We chose the values of A_1, A_2, and A_3 which minimized the value of χ^2, thereby providing the most conservative estimate of the probability that the null hypothesis was true. The result for exam #0013 was that the χ^2 statistic equaled 304. Therefore, the chances were considerably less than 1 in 1,000,000,000 that the observed differences in the distributions could have occurred by randomly assigning subjects to deciles, independent of their race.

We turn now to the results for exam #8046 corresponding to the ones already described for exam #0013. Table 6 shows the estimated number of whites, blacks, and Hispanics in each category for exam #8046. Table 7 shows the confidence intervals for these numbers, and Fig. 4 presents the histogram of the results. We may summarize these results very briefly by saying that the distributions by decile are remarkably similar to those for exam #0013. Indeed, for each racial/ethnic group and for every decile, the 95 percent confidence intervals for the percent of the group in the decile for exam #8046 overlap the intervals for

*To simplify the discussion, we are ignoring the fact that some deciles contain a total of 627 subjects while others contain a total of 626.

Table 6

EXAM 8046

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	365	12.8	26	3.3	14	3.5	405	10.0
2	90-96	358	12.5	40	5.0	8	2.0	406	10.0
3	86-90	343	12.0	42	5.3	20	5.1	405	10.0
4	82-86	340	11.9	54	6.8	12	3.0	406	10.0
5	78-82	305	10.7	69	8.6	31	7.8	405	10.0
6	73-78	296	10.3	65	8.1	45	11.4	406	10.0
7	69-73	270	9.4	102	12.8	33	8.4	405	10.0
8	63-69	222	7.8	126	15.8	58	14.7	406	10.0
9	56-63	251	8.8	104	13.0	50	12.7	405	10.0
10	29-56	112	3.9	170	21.3	124	31.4	406	10.0
Pass	75+	1932	67.5	280	35.1	119	30.1	2333	57.5
Fail	< 75	930	32.5	518	64.9	276	69.9	1722	42.5
Total		2862	100.0	798	100.0	395	100.0	4055	100.0
Average score		80.0		68.9		65.9		76.4	

NOTE: Counts and percents are subject to sampling errors as shown in Table 7.

Table 7

EXAM 8046

95% CONFIDENCE INTERVALS FOR
EXAM SCORE DISTRIBUTION

Decile	Whites		Blacks		Hispanics	
	Number	Percent	Number	Percent	Number	Percent
1	344- 383	11.7-13.8	14- 44	1.6- 6.1	8- 28	1.8- 8.2
2	333- 378	11.3-13.6	19- 64	2.2- 8.8	8- 35	1.8-10.2
3	321- 367	10.9-13.2	24- 63	2.8- 8.7	14- 33	3.1- 9.6
4	322- 355	10.9-12.8	38- 71	4.2- 9.8	11- 38	2.5-11.1
5	287- 327	9.8-11.7	51- 86	5.8-11.9	23- 42	5.1-12.3
6	268- 321	9.1-11.5	45- 86	5.2-11.9	25- 65	5.6-19.0
7	241- 300	8.2-10.8	75-130	8.6-18.0	20- 48	4.5-14.0
8	189- 253	6.4- 9.1	96-155	11.0-21.4	36- 81	8.1-23.7
9	220- 282	7.5-10.1	76-132	8.7-18.2	30- 70	6.7-20.5
10	84- 139	2.9- 5.0	140-200	16.1-27.6	94-153	21.0-44.7
Pass	1886-1978	64.1-71.1	237-322	27.2-44.5	88-150	19.7-43.9
Total	2783-2942	100.0	724-872	100.0	342-447	100.0

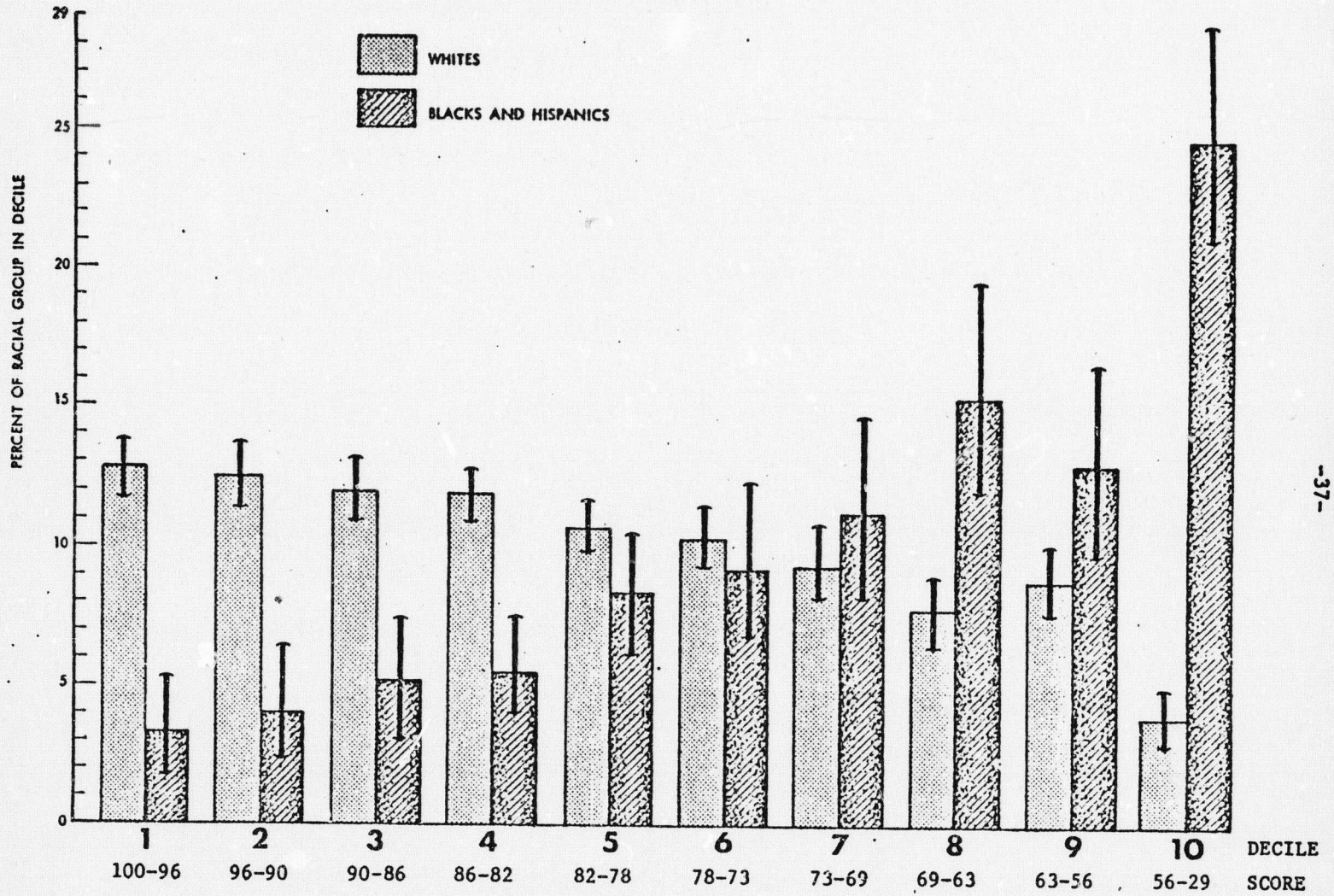

Fig. 4--Estimated exam score distributions and 95% confidence intervals for exam #8046

135a

exam #0013 to a considerable extent. A test of the hypothesis that the distribution of exam scores for whites on exam #8046 was drawn from the distribution for whites on exam #0013 showed that the hypothesis cannot be rejected at the .80 level.

Comparing Figs. 3 and 4 visually, the only noticeable differences between the two are that the percentage of blacks and Hispanics does not decrease between decile 3 and decile 4 for exam #8046, but it does decrease between decile 8 and decile 9. Neither of these observations has any substantive importance and could be entirely explained by errors; for example, the fraction of #8046 sample subjects in deciles 7-10 whose race was determined was somewhat low compared to other deciles.

Therefore we are confident that the patterns observed for exam
2.36 #0013 are not unique to that exam but are most likely typical of the patterns for all recent civil service patrolman's exams. The only major difference between the two exams studied is that the passing grade for exam #8046 was implicitly set higher, relative to the general performance of examinees, than the passing grade for exam #0013. The adverse effect of so setting the passing grade was greater on minority-group members than on whites.

Second Method: PD and Questionnaire Data, with Correction for Response Rate

Before the results from the telephone sample were in hand, we estimated exam score distributions from Police Department and questionnaire data only, correcting for differential response rates as described in Section III. For exam #8046 the parameter representing the ratio of black to white response rate was $q_2 = 1.91$, and the ratio for Hispanics was $q_3 = 1.11$. Using these values for q_2 and q_3, the results for exam #8046 were as shown in Table 8. These preliminary estimates of the percentages for whites fall within the 95 percent confidence intervals of the final results (Table 7) except in two deciles (7 and 10), and the estimates for blacks fall within the interval except for decile 5. The preliminary estimates for Hispanics were substantially different from the final results in deciles 7, 8, 9, and 10, indicating that the assumed ratio of response rates ($q_3 = 1.11$) was too low in the case of

Table 8

EXAM 804

ESTIMATED EXAM SCORE DISTRIBUTIONS BY RACE
DATA FROM PD AND QUESTIONNAIRES ONLY

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	358	12.9	17	2.3	30	5.4	405	10.0
2	90-96	359	12.9	19	2.6	28	5.1	406	10.0
3	86-90	355	12.8	25	3.5	25	4.5	405	10.0
4	82-86	334	12.0	49	6.8	23	4.1	406	10.0
5	78-82	282	10.2	97	13.3	26	4.7	405	10.0
6	73-78	295	10.6	66	9.1	45	8.1	406	10.0
7	69-73	197	7.1	107	14.8	101	18.2	405	10.0
8	63-69	196	7.1	115	15.9	95	17.1	406	10.0
9	56-63	227	8.2	81	11.2	97	17.5	405	10.0
10	29-56	171	6.2	149	20.6	86	15.5	406	10.0
Pass	75+	1910	68.9	257	35.4	166	29.9	2333	57.5
Fail	< 75	864	31.1	468	64.6	390	70.1	1722	42.5
Total		2774	100.0	725	100.0	556	100.0	4055	100.0

Assumption used in deriving table:

The rate of response to the questionnaire by blacks was 91 percent higher than for whites, and the response rate for Hispanics was 11 percent higher than for whites.

Hispanics. (We suspected this might be true at the time, since the response-rate ratios for blacks and Hispanics were very close to each other for exam #0013.)

The Hispanic surname match for exam #8046 confirms the final estimates rather than the preliminary ones. These results are shown on Table 9. All but one of the counts by surname check fall within the 95 percent confidence intervals for the final estimates.

For exam #0013, our preliminary estimates were based on a variant of the method described in Section III. In this case, only the parameter q_2 for blacks was estimated, and the number of Hispanics in each decile was taken from the surname match. These results were as shown in Table 10.* In this case every single preliminary estimate for the percentages lies within the 95 percent confidence interval for the final estimate as shown on Table 5. Therefore, the two methods produced estimates which are completely compatible with each other.

Table 9

EXAM 8046

HISPANIC COUNT BY SURNAME CHECK

Decile	Score	Count	Percent of Total Hispanics	Percent of Subjects in Score Range
1	96-100	10	2.7	2.4
2	90-96	11	3.0	2.7
3	86-90	25	6.8	6.2
4	82-86	16	4.4	3.9
5	78-82	32	8.8	7.9
6	73-78	30	8.2	7.4
7	69-73	45	12.3	11.1
8	63-69	58	15.9	14.3
9	56-63	61	16.7	15.1
10	29-56	77	21.1	19.0
Pass	75+	115	31.5	4.9
Fail	< 75	250	68.5	14.5
Total		365	100.0	9.0

*Actually, the results presented earlier differed by one Hispanic, due to a tabulation error.

Table 10

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM POLICE DEPARTMENT AND QUESTIONNAIRES ONLY
(EXCEPT SURNAME MATCH USED FOR HISPANICS)

		White		Black		Hispanic		Total	
Decile	Score	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	573	12.7	29	2.9	25	3.3	627	10.0
2	92-94	546	12.1	40	4.0	40	5.3	626	10.0
3	89-92	532	11.8	55	5.5	40	5.3	627	10.0
4	87-89	552	12.2	42	4.2	32	4.2	626	10.0
5	84-87	486	10.8	80	8.0	61	8.1	627	10.0
6	80-84	473	10.5	93	9.3	60	8.0	626	10.0
7	76-80	442	9.8	104	10.4	81	10.8	627	10.0
8	70-76	386	8.6	138	13.8	102	13.5	626	10.0
9	61-70	319	7.1	179	17.9	129	17.1	627	10.0
10	0-61	202	4.5	242	24.2	183	24.3	627	10.0
Pass	75+	3712	82.3	482	48.1	375	49.8	4569	72.9
Fail	< 75	799	17.7	520	51.9	378	50.2	1697	27.1
Total		4511	100.0	1002	100.0	753	100.0	6266	100.0

Assumption used in deriving table:

Response rate by blacks to questionnaire was 51 percent higher than for whites.

Third Method: Census Data

We turn now to our findings based on analysis of census data. As mentioned previously, these results were obtained for residents of Manhattan, Bronx, Brooklyn, and Queens.* Therefore, to the extent that examinees from elsewhere may have performed differently, one cannot necessarily expect the exam score distributions found by this method to agree with the results described previously. However, as we shall see below, nearly all the blacks and Hispanics who took the exam came from these four boroughs, and therefore the distributions for these two groups should be correct.

The analysis was performed in two ways. In one case, all subjects with Hispanic surnames were excluded, and the remaining subjects were assumed to be either black or white; therefore the census data were used to determine the probability that a subject was black or white. In the second case, all subjects with known census tracts were included, and census data were used to determine the probability that the subject was white, black, or Hispanic.

The results for exam #0013 are shown in Table 11. These are derived from census data for 4261 subjects, which is 85.9 percent of those who lived in the four boroughs. (The census tract of residence was not determined by computer match for the others. There is no reason to believe that the missing subjects are different in any way.) The numbers shown on the table are the estimated percentages of the racial group who scored in the indicated range, followed by the 95 percent confidence interval. Thus, for example, we estimate from census data, excluding subjects with Hispanic surnames, that 13.8 percent of the whites from the four boroughs scored in the first decile, and we are 95 percent confident that the true percentage lies between 12.5 (i.e., 13.8 - 1.3) and 15.1 (i.e., 13.8 + 1.3).

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*Some subjects with mailing addresses outside New York may have been New York City residents. This is particularly possible with military addresses (180 subjects). Conversely, some City addresses, especially post office boxes, may belong to nonresidents.

Table 11

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

Decile	Excluding Hispanic Surname		Including All Subjects		
	White	Black	White	Black	Hispanic
1	13.8 ± 1.3	2.3 ± 1.5	14.4 ± 1.4	2.7 ± 1.8	1.7 ± 2.5
2	11.7 ± 1.2	3.8 ± 1.7	12.3 ± 1.3	3.5 ± 1.9	3.8 ± 2.8
3	12.1 ± 1.2	4.3 ± 1.7	12.3 ± 1.3	5.7 ± 2.2	3.2 ± 2.8
4	12.4 ± 1.2	3.4 ± 1.6	12.0 ± 1.3	2.4 ± 1.8	7.2 ± 3.1
5	11.2 ± 1.2	7.0 ± 2.0	11.6 ± 1.3	8.1 ± 2.6	5.3 ± 3.1
6	10.5 ± 1.2	7.5 ± 2.1	10.7 ± 1.2	8.7 ± 2.6	6.0 ± 3.2
7	9.5 ± 1.1	12.8 ± 2.5	9.1 ± 1.2	10.2 ± 2.9	14.4 ± 4.0
8	8.0 ± 1.0	16.1 ± 2.8	7.8 ± 1.1	14.3 ± 3.3	17.0 ± 4.3
9	6.1 ± 0.9	21.1 ± 3.0	5.9 ± 1.0	22.1 ± 3.7	15.9 ± 4.4
10	4.7 ± 0.8	21.6 ± 3.0	4.1 ± 0.9	22.2 ± 3.8	25.6 ± 4.8
Pass	83.4 ± 1.4	45.7 ± 3.8	84.5 ± 1.6	45.5 ± 4.7	46.2 ± 5.9
Fail	16.6 ± 1.4	54.3 ± 3.8	15.5 ± 1.6	54.5 ± 4.7	53.8 ± 5.9

NOTE: Numbers after ± give 95% confidence intervals. Portions of range lying below zero may be ignored.

Comparing Table 11, derived from census data, with Table 5, derived from data obtained from subjects, we see that in every instance the 95 percent confidence intervals overlap. Therefore the estimates by these two different methods are entirely compatible, and each one may be considered as confirming the other. We wish to emphasize that *the information received from the subjects about their race was not used in any way whatsoever* in deriving the results on Table 11. Therefore, the data sources underlying Table 10, which is derived only from Police Department and questionnaire data, are completely independent of those underlying Table 11, and yet both of these are essentially the same as Table 5.

For several reasons, we tend to believe that the estimates in Table 11 are more accurate than any of the others presented previously. First, the raw data from the questionnaire were found to be unreliable due to large differences in response rates, which could be only approximately corrected. Second, we may have introduced a bias into the results based on the telephone sample by omitting sample subjects who could not be reached on the telephone and who lived in integrated census tracts. Third, the Hispanic surname check was shown to be erroneous in some cases. Fourth, the 95 percent confidence intervals in Table 11 are, for the most part, smaller than the intervals based on sampling, and therefore the estimates have greater precision.* The census method therefore has potential applications to obviate the need for any survey techniques in future analyses of this type.**

We conclude from the census data that the fraction of blacks who failed this exam was probably higher than indicated on previous tables, and lies between 50 and 58 percent. The fraction of Hispanics who failed was about the same, while the fraction of whites who failed was between 14 and 18 percent. Therefore, the fail rate for minority-group members was over three times as large as the fail rate for whites. The patterns by decile have been confirmed by this method as described earlier: the fraction of whites in each decile decreases monotonically from the first to the tenth, with the possible exception of decile 4.

The census-method results for exam #8046 are shown in Table 12. These are based on data for 2813 subjects, out of 3404 who lived in the four boroughs (82.6 percent). Once again, in every instance the confidence intervals for these distributions overlap the ones in Table 7, derived from data from the subjects. Therefore, the census method confirms the previously reported findings for this exam also. We note that the confidence intervals for this exam are larger than for exam #0013 (i.e., the estimates are less precise). This is partially due

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*The telephone sample would have required 850 subjects to match the accuracy of the census method.

**In cities other than New York, data for census *blocks* rather than *tracts* may be required to achieve the accuracy found here.

Table 12

EXAM 8046

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

Decile	Excluding Hispanic Surname		Including All Subjects		
	White	Black	White	Black	Hispanic
1	12.5 ± 1.5	3.6 ± 1.8	12.6 ± 1.6	2.8 ± 2.1	5.6 ± 3.8
2	12.2 ± 1.5	4.2 ± 1.8	12.1 ± 1.6	3.6 ± 2.2	6.8 ± 4.1
3	12.0 ± 1.5	4.4 ± 1.9	11.3 ± 1.6	3.6 ± 2.3	10.8 ± 4.3
4	11.9 ± 1.5	7.6 ± 2.2	12.6 ± 1.6	8.2 ± 2.7	3.5 ± 3.8
5	10.0 ± 1.4	10.1 ± 2.4	10.0 ± 1.5	12.3 ± 3.0	6.5 ± 4.2
6	9.7 ± 1.3	10.5 ± 2.4	9.2 ± 1.7	11.1 ± 3.4	11.1 ± 4.8
7	10.0 ± 1.5	7.7 ± 2.6	10.5 ± 1.8	6.9 ± 3.4	9.5 ± 5.0
8	8.4 ± 1.4	14.7 ± 3.2	9.1 ± 1.7	15.8 ± 4.8	10.9 ± 5.5
9	8.2 ± 1.4	13.7 ± 3.1	8.5 ± 1.6	13.0 ± 4.4	13.7 ± 5.9
10	4.9 ± 1.1	23.5 ± 3.7	4.2 ± 1.2	23.0 ± 5.8	21.1 ± 7.1
Pass	65.9 ± 2.8	37.8 ± 4.4	65.1 ± 3.5	38.0 ± 10.2	43.3 ± 12.1
Fail	34.1 ± 2.8	62.2 ± 4.4	34.9 ± 3.5	62.0 ± 10.2	56.7 ± 12.1

NOTE: Numbers after ± give 95% confidence intervals. Portions of ranges lying below zero may be ignored.

to the smaller number of subjects for this exam, but is mostly explained by the fact that the date of birth was not provided to the Institute for subjects who failed this exam. Knowing the age of a subject permits a more accurate estimate of his race from census data than knowing only his approximate age. Nonetheless, the census-method estimates are still more precise than those based on our sample.

We conclude that between 31 and 37 percent of whites failed this exam, while between 57 and 67 percent of blacks failed, yielding a failure rate at least 1.5 times as high.

Summary of Results for Exam Score Distributions

To summarize, we have found substantial and statistically significant differences by race in the distributions of exam scores for whites as compared to blacks and Hispanics for both exam #8046 and exam #0013. Blacks and Hispanics scored lower than whites and failed at higher rates. No passing grade could have been set to result in equal proportions of whites and minority-group members passing. These findings were confirmed by three different methods of data analysis.

PROGRESS THROUGH THE APPOINTMENT PROCESS

Using racial data from our questionnaire and telephone sample, together with information from the Police Department about subjects who passed, whether their race was known to the PD or not, we were able to estimate the number of subjects by race at the steps of the appointment process after the written examination. These results are shown in Table 13 for exam #8046 and in Table 14 for exam #0013.

We observe that the fraction of passing blacks who appeared for the physical-medical exam was slightly higher than the fraction of whites and Hispanics. There were no substantial differences at all in the rates at which the three racial/ethnic groups passed the physical-medical exam. Blacks who passed the physical-medical appear to have been slightly less likely than whites and Hispanics to submit a PA-15, but the differences are not statistically significant. The data available to us do not suggest that the efforts introduced by the Police Department to encourage minority-group members to submit their PA-15s have produced any substantial differences for the 1970 subjects as compared to the 1968 subjects. This may be explained by the fact that the vast majority of persons who receive a PA-15 submit it anyway.

For Hispanics, we can confirm the estimates in Tables 13 and 14 by using the Hispanic surname check. The results from this method are shown in Table 15 for both exams. Any differences between this table and the Hispanic column on the previous two merely illustrate the range of errors of the estimates.

Table 13

EXAM 8046

PROGRESS THROUGH THE APPOINTMENT PROCESS BY RACE
DATA FROM PD, QUESTIONNAIRES, TELEPHONE SAMPLE

Step	Whites		Blacks		Hispanics		Total	
	Number	Percent of Preceding Step	Number	Percent of Preceding Step	Number	Percent of Preceding Step	Number	Percent of Preceding Step
1. File application	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)
2. Appear for exam	2862	--	798	--	395	--	4055	--
3. Pass exam	1932	67.5	280	35.1	119	30.1	2333	57.5
4. Appear for phys-med	1336	69.2	213	76.1	61	51.3	1610	69.0
5. Pass phys-med	1025	76.7	168	78.9	47	77.0	1240	77.0
6. Submit PA-15	992	96.8	142	84.5	46	97.9	1180	95.2

[a]Unknown.

145 ow

Table 14

EXAM 0013

PROGRESS THROUGH THE APPOINTMENT PROCESS BY RACE
DATA FROM PD, QUESTIONNAIRES, TELEPHONE SAMPLE

Step	Whites		Blacks		Hispanics		Total	
	Number	Percent of Preceding Step	Number	Percent of Preceding Step	Number	Percent of Preceding Step	Number	Percent of Preceding Step
1. File application	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)
2. Appear for exam	4481	--	967	--	818	--	6266	--
3. Pass exam	3670	81.9	527	54.5	372	45.5	4569	72.9
4. Appear for phys-med	2412	65.7	419	79.5	248	66.7	3079	63.4
5. Pass phys-med	1820	75.5	318	75.9	205	82.7	2343	76.1
6. Submit PA-15	1624	89.2	264	83.0	183	89.2	2071	88.3

[a]Unknown.

146a

Table 15

PROGRESS THROUGH THE APPOINTMENT PROCESS
FOR SUBJECTS WITH HISPANIC SURNAMES

Step	Exam 8046		Exam 0013	
	Number	Percent of Preceding Step	Number	Percent of Preceding Step
1. File application	(a)	(a)	(a)	(a)
2. Appear for exam	365	--	753	--
3. Pass exam	115	31.5	375	49.8
4. Appear for phys-med	81	70.4	280	74.7
5. Pass phys-med	57	70.4	213	76.1
6. Submit PA-15	55	96.5	180	84.5

[a]Unknown.

In summary, the data show no important differences by race in the steps of the appointment process following the written civil service exam. Therefore, the differences in proportions of black, white, and Hispanic applicants who submit a form PA-15 are entirely explained by differences in pass rates on the written exam. Statistical tests on the data do not confirm the plaintiffs' allegations that minority-group applicants find the PA-15 form so forbidding that they fail to submit it, although for both exams the estimated percentage of blacks who submitted PA-15s was lower than for whites and Hispanics.*

OUTCOME OF THE BACKGROUND INVESTIGATION

We can describe the progress of the three racial/ethnic groups through the background investigation only for exam #8046, since nearly all the investigations for exam #0013 were incomplete when we collected

*We do agree with both the plaintiffs and the Police Department that questions on the PA-15 which are unnecessary for selection and possibly difficult to fill out should be eliminated. The Police Department is revising the PA-15 at the present time.

data in December 1972. The counts shown in Table 16 are derived entirely from data received from the Police Department, the questionnaire respondents, and the subjects reached by telephone; no estimates of any kind were made for this part of the analysis.

Table 16a presents the counts for subjects who are *known* to have passed the physical-medical exam, and Table 16b presents the counts including subjects who are *assumed* to have passed the physical-medical because they submitted a PA-15. Using either tabulation, one sees that, for this exam, approximately equal proportions of whites, blacks, and Hispanics who submitted PA-15s were appointed to the police force. In addition, approximately equal proportions of the three racial/ethnic groups had "pending" applications in December 1972. (This means their background investigations were incomplete.)

However, the proportion of minority-group candidates termed "uncooperative" on exam #8046 (an average of 13.6 percent of blacks and Hispanics together, using Table 16a) is significantly larger than the fraction of whites termed "uncooperative" (8.3 percent).* In addition, the fraction of blacks and Hispanics who are rejected by the background investigator appears higher than the fraction of whites rejected. But the significance level of the larger fraction of minority-group members rejected differs depending on whether one uses the figures from Table 16a or from Table 16b, the latter emerging as significant at the .05 level.

The most important finding from these data is that, among those who submitted PA-15s, the proportions of white, black, and Hispanic candidates appointed do not differ either statistically or in any substantive way from each other. And even though there were statistically significant differences in the proportions of white and minority-group applicants termed "uncooperative," these differences were small and were counterbalanced by the numbers who withdrew. The plaintiffs allege that a greater proportion of minority-group members are forced to "withdraw" from the final steps of the appointment process due to discriminatory practices of the background investigators.(9) The data,

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*By a 2 x 2 chi-square test with Yates correction at the .05 level.

Table 16a

SUBJECTS OF KNOWN RACE KNOWN TO HAVE PASSED PHYSICAL AND SUBMITTED PA-15: EXAM #8046

Racial/Ethnic Group	Appointed		Rejected		Withdrew		Uncoop.		Pending		Total	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
White	470	55.7	26	3.1	133	15.8	70	8.3	145	17.2	844	100.0
Black	56	50.5	8	7.2	16	14.4	16	14.4	15	13.6	111	100.0
Hispanic	23	56.1	2	4.9	4	9.8	5	12.2	7	18.9	41	100.0
Total	549	55.1	36	3.6	153	15.4	91	9.1	167	16.8	996	100.0

Table 16b

SUBJECTS OF KNOWN RACE WHO SUBMITTED PA-15, EXCLUDING THOSE WHO FAILED PHYSICAL OR FAILED TO APPEAR: EXAM #8046

Racial/Ethnic Group	Appointed		Rejected		Withdrew		Uncoop.		Pending		Total	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
White	470	49.1	26	2.7	179	18.7	92	9.6	190	19.9	957	100.0
Black	56	41.2	11	8.1	19	14.0	23	16.9	27	19.9	136	100.0
Hispanic	23	51.1	2	4.4	6	13.3	5	11.1	9	20.0	45	100.0
Total	549	48.2	39	3.4	204	17.9	120	10.5	226	19.9	1138	100.0

Source: NYC Police Department records for each subject as of December 1972, plus questionnaire or telephone data for eight subjects who responded.

however, do not confirm this allegation, and in fact show that for exam #8046 a slightly higher proportion of whites withdrew from the appointment process than blacks and Hispanics.

We also note that the 1968 examinees whose application was still pending in 1972 were proportionately drawn from the three racial/ethnic groups. Since this 1968 list was scheduled to expire in 1972, but was extended by the City Counsel, the men labeled "pending" are those who ordinarily would have lost their chance for appointment. Therefore, the plaintiffs' allegation that expiration of appointment lists after a period of several years will adversely affect minority-group members to a greater extent than whites is not borne out by the data for exam #8046.

After 1968, the Police Department established a Minority Recruitment and Reevaluation Group (now called the Recruitment and Selection Section of the Employment Division) whose purpose was to encourage and assist minority-group applicants to complete the application process.* It is regrettable that results of the background investigations for 1970 subjects were not available when we collected data in December 1972, since the data for the earlier exam (#8046) do not reflect any influence of this change that may have occurred.

GEOGRAPHICAL CHARACTERISTICS

As a secondary product of our census data analysis, we were able to determine the locations of the residences of applicants for these two examinations, and the exam score distributions for each borough. These findings bear on a portion of the lawsuit not mentioned above, which was not a primary concern of the study. The plaintiffs have petitioned the Court to reinstate the requirement that police officers should reside in New York City. Their complaint states that "the Minority population of...[Nassau, Westchester, Suffolk, Orange, Rockland and Putnam counties] is substantially lower than that of New York City.

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*This change was based in part on our recommendations from a previous study.(7)

Accordingly, the present requirement in fact discriminates against Minorities."(1)

Our findings in regard to residences of the examinees are shown in Tables 17-20. We observe from Table 17 that when addresses outside New York City are excluded, the proportions of examinees from each borough are approximately the same for both exams. However, proportionately more non-City residents appeared for exam #0013 than for #8046. The numbers of applicants from each borough reflect the total age 16-34 male populations of the boroughs, except that Manhattan is somewhat underrepresented among applicants and Staten Island is overrepresented.

From Tables 18 and 19 we see that the largest group of black examinees came from Brooklyn, and the largest group of Hispanics from the Bronx. We confirm the plaintiffs' allegations that the number of minority-group applicants from outside New York City is quite small, constituting at most 7 percent of the total of minority applicants.* By contrast, at least 14 percent of white applicants were from outside the City.

By comparing the racial composition of examinees with estimates of the racial composition of each borough's males aged 16-34 (Table 20), we found that the proportions of minority-group applicants from Manhattan and Queens were at least as high as their proportion of the population. However, there were fewer minority-group applicants from Brooklyn, and fewer Hispanic applicants from the Bronx, than would be expected from their numbers in the population. We cannot consider Table 20 to be very reliable, since the census is known to have undercounted black and Hispanic males in the age range of interest here. We are more confident that *proportions* of the population by race in a census tract are correct (especially when near zero or 100 percent) than we are that the total counts by borough are correct.

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*In these tables, we have included Staten Island with locations outside the City only because 1970 census tracts were unavailable from City Planning for subjects in this borough. Some subjects included in the "outside NYC" category may have been City residents with temporary addresses elsewhere, and vice versa.

Table 17

BOROUGH OF RESIDENCE

Borough	#8046 Examinees			#0013 Examinees			Males Aged 16-34 from 1970 Census	
	Number	Percent of City	Percent of Total	Number	Percent of City	Percent of Total	Number	Percent
Manhattan	371	10.2	9.1	547	10.2	8.7	218,300	21.0
Bronx	762	21.0	18.8	1138	21.3	18.2	194,900	18.7
Brooklyn	1378	38.0	34.0	2078	38.9	33.2	338,500	32.5
Queens	892	24.6	22.0	1196	22.4	19.1	250,100	24.0
Staten Island	227	6.2	5.6	389	7.3	6.2	39,500	3.8
Total NYC	3630	100.0	89.5	5348	100.0	85.3	1,041,300	100.0
Outside NYC	425		10.5	918		14.7		
Total	4055		100.0	6266		100.0		

Table 18

EXAM 8046

RESIDENCE OF EXAMINEES BY RACE
ESTIMATED FROM CENSUS DATA

Borough	Whites		Blacks		Hispanics		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Per cent
Manhattan	162	43.7	130	35.0	79	21.3	371	100.0
Bronx	415	54.6	195	25.6	152	19.9	762	100.0
Brooklyn	963	69.9	305	22.1	110	8.0	1378	100.0
Queens	716	80.3	135	15.1	41	4.6	892	100.0
Staten Island and outside NYC[a]	597	91.5	33	5.1	22	3.4	652	100.0
Total	2853	70.3	798	19.7	404	10.0	4055	100.0

[a]Estimated from PD, questionnaire, and telephone sample data.

Table 19

EXAM 0013

RESIDENCE OF EXAMINEES BY RACE
ESTIMATED FROM CENSUS DATA

Borough	Whites		Blacks		Hispanics		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Manhattan	237	43.3	163	29.8	147	26.9	547	100.0
Bronx	618	54.3	207	18.2	313	27.5	1138	100.0
Brooklyn	1462	70.4	359	17.3	257	12.4	2078	100.0
Queens	965	80.7	147	12.3	84	7.0	1196	100.0
Staten Island and outside NYC[a]	1139	87.1	91	7.0	77	5.9	1307	100.0
Total	4421	70.6	967	15.4	878	14.0	6266	100.0

[a]Estimated from PD, questionnaire, and telephone sample data.

Table 20

NYC MALES AGED 16-34 BY RACE
ESTIMATED FROM FOURTH COUNT CENSUS DATA[a]

Borough	Whites		Blacks		Hispanics		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Manhattan	125,700	58.6	41,900	19.5	47,000	21.9	214,500	100.0
Bronx	90,100	46.6	42,900	22.2	60,500	31.3	193,400	100.0
Brooklyn	198,100	59.5	79,400	23.9	55,400	16.6	332,900	100.0
Queens	196,600	79.5	29,900	12.1	20,800	8.4	247,400	100.0
Staten Island	35,000	89.4	2,300	5.9	1,700	4.4	39,100	100.0
Total	645,500	62.8	196,500	19.1	185,400	18.1	1,027,400	100.0

[a]Estimates are rounded to the closest hundred. They are based on the authors' definitions of the three racial/ethnic classifications and were calculated as described in Appendix D. They cannot be found in tabulations provided by the Census Bureau, which defines race differently. Totals differ from those on Table 17 due to sampling used for the Fourth Count by the Census Bureau and omission of tracts for which no breakdown by race was provided.

A reasonable interpretation of Table 20, in light of the uncertainties, is that blacks from the City are not less likely than whites to apply to become policemen, while Hispanics are somewhat less likely. Therefore, the primary reasons that blacks are underrepresented among recruits are (1) few non-City applicants are black and (2) a smaller proportion of blacks than whites pass the written civil service examination.

The performance on the civil service exam of subjects from different locations is interesting, although unrelated to the lawsuit. We present our findings in this regard only for exam #0013, since the results for exam #8046 were similar but with larger error ranges. The number of Hispanics in some boroughs was too small to provide useful estimates for this group, so they are omitted from this analysis.

Table 21a shows the exam score distributions for subjects residing in Manhattan and the Bronx, and Table 21b for Brooklyn and Queens. In each borough, the blacks scored lower than the whites. Whites from Brooklyn performed less well than whites from elsewhere, with about 20 percent of the Brooklyn whites failing, compared to around 13 percent in the other three boroughs. Blacks from Manhattan scored lower than their counterparts from elsewhere, with about 37 percent passing. Blacks from Queens performed substantially above the norm for their racial group, with about 60 percent passing.

The exam score distributions for subjects from Staten Island and outside New York City, who as we saw are mostly white, are shown in Table 22. They performed slightly less well than whites from the rest of the City. Therefore, since not all of the non-City residents were in fact white, a consistent interpretation of the data is that subjects from outside the City scored about the same as members of their ethnic group who lived in the City.

Table 21a

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)

Decile	Manhattan		Bronx	
	White	Black	White	Black
1	16.1 ± 5.1	0.5 ± 2.0	16.3 ± 3.2	1.6 ± 3.2
2	13.5 ± 5.0	2.4 ± 3.1	12.8 ± 3.0	2.4 ± 3.2
3	14.8 ± 5.3	5.1 ± 4.1	11.0 ± 2.8	3.1 ± 3.3
4	14.0 ± 5.1	0.2 ± 1.7	12.2 ± 2.8	5.3 ± 3.9
5	7.0 ± 4.0	6.5 ± 4.4	12.6 ± 3.0	7.7 ± 4.5
6	9.9 ± 4.4	9.3 ± 5.2	10.6 ± 2.7	5.1 ± 3.8
7	11.5 ± 4.8	10.2 ± 5.3	8.4 ± 2.6	14.0 ± 5.4
8	3.6 ± 3.0	14.7 ± 6.0	7.0 ± 3.3	18.2 ± 5.7
9	6.2 ± 4.0	21.8 ± 7.4	4.6 ± 3.3	22.7 ± 6.3
10	3.3 ± 3.2	29.2 ± 7.8	4.6 ± 3.9	19.9 ± 5.8
Pass	87.4 ± 5.6	36.6 ± 8.6	85.8 ± 4.5	45.6 ± 7.6
Fail	12.6 ± 5.6	63.4 ± 8.6	14.2 ± 4.5	54.4 ± 7.6
Total subjects in borough	547		1138	
Number with census tract known	444		999	

NOTE: Numbers after ± sign give 95% confidence intervals. Portions of ranges lying below zero may be ignored.

Table 21b

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)

Decile	Brooklyn		Queens	
	White	Black	White	Black
1	12.1 ± 1.8	2.0 ± 2.0	14.8 ± 2.4	6.2 ± 4.9
2	10.5 ± 1.7	4.7 ± 2.7	12.6 ± 2.3	4.7 ± 4.3
3	12.2 ± 1.8	4.0 ± 2.5	11.9 ± 2.2	6.1 ± 4.6
4	11.0 ± 1.7	3.5 ± 2.4	14.2 ± 2.4	5.0 ± 4.3
5	10.3 ± 1.7	5.7 ± 2.8	12.7 ± 2.3	10.1 ± 5.8
6	10.8 ± 1.7	7.2 ± 3.1	10.0 ± 2.1	10.3 ± 5.7
7	10.2 ± 1.7	12.4 ± 3.9	8.5 ± 1.9	14.4 ± 6.6
8	9.7 ± 1.6	15.3 ± 4.2	6.7 ± 1.8	16.9 ± 6.9
9	7.2 ± 1.5	23.1 ± 4.8	5.1 ± 1.5	12.5 ± 5.9
10	5.8 ± 1.3	22.0 ± 4.7	3.4 ± 1.3	13.8 ± 6.0
Pass	79.6 ± 2.3	44.4 ± 5.8	86.9 ± 2.4	60.4 ± 9.0
Fail	20.4 ± 2.3	55.6 ± 5.8	13.1 ± 2.4	39.6 ± 9.0
Total subjects in borough	2078		1196	
Number with census tract known	1840		978	

NOTE: Numbers after ± sign give 95% confidence intervals.

Table 22

EXAM 0013

EXAM SCORE DISTRIBUTIONS
SUBJECTS RESIDING IN STATEN ISLAND OR OUTSIDE NYC

Decile	Staten Island		Outside NYC	
	Number	Percent	Number	Percent
1	33	8.5	89	9.7
2	38	9.8	111	12.1
3	49	12.6	104	11.3
4	38	9.8	114	12.4
5	39	10.0	98	10.7
6	51	13.1	103	11.2
7	52	13.4	83	9.0
8	38	9.8	78	8.5
9	33	8.5	71	7.7
10	18	4.6	67	7.3
Pass	312	80.2	729	79.4
Fail	77	19.8	189	20.6
Total	389	100.0	918	100.0

PERFORMANCE ON THE WRITTEN EXAM BY AGE

The last set of findings, also subsidiary to the main objectives of the study, are presented mainly for their general interest. For exam #0013, we determined the ages of the subjects when they took the examination and compared the performance of different age groups.* As shown in Table 23, a few 15-year-olds took the examination, and the largest single group was the 17-year-olds. Over half of the examinees were between 16 and 21, inclusive.

The youngest applicants performed less well than any of the others, with the highest grades being achieved by the 22-year-olds. The oldest examinees (aged 29 and higher) also scored relatively high on this examination. See Table 24.

The black subjects were older than the others on the average (22.7 years), with the Hispanics next (21.6), and the whites youngest (20.7). Since the older subjects performed somewhat better than the young ones on the written exam, there is nothing about the ages of subjects by race which would help explain the lower scores of minority-group members on this exam.

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*The ages of failing subjects on exam #8046 were not provided to the Institute.

Table 23

EXAM 0013

AGE OF SUBJECTS IN JULY 1970

Age	Number of Subjects	Percent
15	15	0.2
16	404	6.5
17	656	10.6
18	622	10.1
19	504	8.2
20	569	9.2
21	598	9.7
22	624	10.1
23	581	9.4
24	363	5.9
25	310	5.0
26	293	4.7
27	252	4.1
28	177	2.9
29	92	1.5
30+	114	1.8
Total known	6174	100.0
Unknown	92	

Average age: 21.33

Table 24

EXAM 0013

AVERAGE SCORE BY AGE

Age	Average Exam Grade
15	66.4
16	74.9
17	77.3
18	80.0
19	79.3
20	81.6
21	81.5
22	83.5
23	82.8
24	82.4
25	81.8
26	80.1
27	79.9
28	79.4
29	82.4
30+	81.5
All	80.4

Appendix A

DATA FROM DEPARTMENT OF PERSONNEL

The following information was provided to The New York City-Rand Institute by the NYC Department of Personnel for each person who appeared to take exam #8046 or #0013:

1. Exam number ..... 8046 or 0013
2. Name of applicant
3. Mailing address on application form
4. Date of birth* ..... Month/Day/Year
5. Score on written examination ..... Range 0.0-100.0
6. Adjusted score after veteran's credits** ... Range 75.0-110.0
7. Pass/fail code ..... 11 = fail
8. Application number ..... Five digits
9. Claim for veterans or disabled veterans* ... V or D
10. List number**

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*Missing for subjects who failed exam number 8046.

**Only for subjects who passed the written examination.

Appendix B

DATA FROM THE NEW YORK CITY POLICE DEPARTMENT

Data from the New York City Police Department were gathered from files in the Background Investigation Section and the Personnel Records and Employment Section by a team of police officers under the supervision of Institute personnel. The officers were given a computer listing of all subjects who passed the exams and they were requested to circle the correct code on the printout. For purposes of illustration, a sample line of the material on the computer printout following the list number and name of the applicant appears below.

RACE	MED./PHYS.	RETURN PA-15	FINAL STATUS
W B H ? U	P F FTA U	YES/NO	ACCPT REJ W/D UNCOOP PENDG

The code symbols are explained as follows:

RACE

W	White
B	Black
H	Hispanic
?	Questionable*
U	Unknown**

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*The designation "questionable" was used in cases where the applicant's race was uncertain from Police Department records. For example, if a subject's name was Jose Diaz (a Hispanic surname) and his fingerprint card said "white" and no other information was available, he would receive this code. Ambiguities of this type occurred infrequently. There were 4 subjects termed "questionable" for exam #8046 and 32 for exam #0013. This is less than 2 percent of all subjects who submitted PA-15s.

**Subjects who either failed to provide necessary information with their PA-15 form or whose folder could not be located in the police files (e.g., the file was removed because the subject was still under investigation) received an "unknown" race. There was a total of 161 subjects whose race could not be determined out of 3301 who submitted PA-15s, or 4.9 percent.

MED./PHYS.

P	Pass
F	Fail
FTA	Fail to Appear
U	Unknown

RETURN PA-15

YES	PA-15 returned to PD
NO	No PA-15

FINAL STATUS

ACCPT	Accepted
REJ	Rejected
W/D	Withdrew
UNCOOP	Uncooperative
PENDG	Pending

The Police Department can determine the race of those subjects who submitted PA-15 forms. In fact, some of them have already been appointed to the Department, and their race is available from Police Department personnel records and picture identification cards.

The majority of the other applicants who submitted a PA-15 supplied a photograph and fingerprints with their application. In many instances the fingerprint identification card indicates the race of the applicant. Where race was not entered on the fingerprint card, identification was made on the basis of a photograph contained in the personnel folder. In the few instances when even this information was unavailable, place of birth and the subject's name and parents' first names were examined. In obvious cases, for example where the subject was born in Puerto Rico, he was classified as Hispanic. Therefore, in most cases where a PA-15 had been submitted, it was possible to make a positive identification of the racial/ethnic group of the applicant using the fingerprint card, photograph, and other information provided on the PA-15 itself.

Utilizing the results from the questionnaire (see Appendix C) we were able to check the accuracy of ethnic data available from the Police Department. Approximately 5 percent of the subjects from each exam who responded to the questionnaire provided information about their race

which differed from the Police Department. On the 1968 exam there were 134 men whose race was known to us both from the Police Department and questionnaire. Of these, 10 provided answers to the questionnaire which indicated their race as different from the Police records. On the 1970 exam, 27 out of 595 subjects provided different answers about their race. These data were rechecked with the Police Department and it was determined that in 17 cases the Department classification had been incorrect. This enabled us to estimate that the error rate for the Police Department coders with respect to race was only 2.3 percent.

The data obtained from the Police Department identified the race of 1173 subjects who took exam #8046 and 1968 of the subjects who passed exam #0013. Overall, nearly 50 percent of those who passed the two exams, and about 30 percent of the total group, were identified from Police Department data.

Using the raw exam scores on the written examination, we broke the group into deciles for each exam. The first decile consists of the highest-scoring 10 percent of the men who took the exam. In other words, since there were 4055 men who took exam #8046, the first decile consists of the top 405 men. Similarly, the top decile for exam #0013 consists of the highest-scoring 627 men. The second decile consists of the next highest-scoring 10 percent, and so forth, down to the tenth decile.

When grouped by decile, the data from the Police Department for exams #0013 and #8046 turned out as shown in Tables B-1 and B-2. In each position on these tables we have one number and two percentages. For example, on exam #0013 (Table B-1) the number of men who submitted PA-15s and were whites in the highest decile is shown as 223. The number 90.3 indicates that these men constitute 90.3 percent of all the men in the top decile. The number 14.2 indicates that these 223 men constitute 14.2 percent of all the whites who submitted PA-15s. Looking at the percent of each decile which is white, we see that it decreases steadily from 90.3 percent in the top decile to 88.2 percent in the second decile, and so forth, down to 53.0 percent in the eighth decile. Ranks lower than the eighth decile are not shown since these correspond to failing grades. Corresponding to the steady decrease in the percentage white is a steady increase in the percentage of minority-group members in each decile, which

Table B-1

EXAM #0013

SUBJECTS OF KNOWN RACE WHO SUBMITTED PA-15

Decile	Score	Racial/Ethnic Group									Total	
		White			Black			Hispanic				
		No.	% of decile	% of all Ws[a]	No.	% of decile	% of all Bs[a]	No.	% of decile	% of all Hs[a]	No.	%
1	94-100	223	90.3	14.2	9	3.6	3.7	15	6.1	9.6	247	12.6
2	92-94	218	88.6	13.9	17	6.9	7.0	11	4.5	7.1	246	12.5
3	89-92	216	87.1	13.8	21	8.5	8.6	11	4.4	7.1	248	12.6
4	87-89	244	86.8	15.6	22	7.8	9.1	15	5.3	9.6	281	14.3
5	84-87	209	75.2	13.3	38	13.7	15.6	31	11.2	19.9	278	14.1
6	80-84	225	77.3	14.3	43	14.8	17.7	23	7.9	14.7	291	14.8
7	76-80	190	65.6	12.1	70	23.8	28.8	34	11.6	21.8	294	14.9
8	75-76	44	53.0	2.8	23	27.7	9.5	16	19.3	10.4	83	4.2
Total		1569	79.7	100.0	243	12.3	100.0	156	7.9	100.0	1968	100.0

SOURCE: NYC Police Department records for each subject as of December 1972.

[a]Percent of all members of that group who submitted PA-15 form.

Table B-2

EXAM #8046

SUBJECTS OF KNOWN RACE WHO SUBMITTED PA-15

Decile	Score	Racial/Ethnic Group									Total	
		White			Black			Hispanic				
		No.	% of decile	% of all Ws[a]	No.	% of decile	% of all Bs[a]	No.	% of decile	% of all Hs[a]	No.	%
1	96-100	184	94.4	18.6	10	5.1	7.1	1	0.5	2.3	195	16.6
2	90-96	172	90.1	17.4	16	8.4	11.3	3	1.6	6.8	191	16.3
3	86-90	181	87.0	18.3	21	10.1	14.9	6	2.9	13.6	208	17.7
4	82-86	166	81.8	16.8	30	14.8	21.3	7	3.4	15.9	203	17.3
5	78-82	160	75.8	16.2	35	16.6	24.8	16	7.6	36.4	211	18.0
6	75-78	125	75.8	12.7	29	17.6	20.6	11	6.7	25.0	165	14.1
Total		988	84.2	100.0	141	12.0	100.0	44	3.8	100.0	1173	100.0

SOURCE: NYC Police Department records for each subject as of December 1972.

[a]Percent of all members of that group who submitted PA-15 form.

167a

equals 100 percent minus the percentage for whites. These data indicate a very strong difference in the distributions among the three racial/ethnic groups. Using a chi-square test, the significance of both tabulations is under .0001, so there is less than 1 chance in 10,000 that the observed disparity would occur if each man's decile position had been chosen randomly.

These differences between the numbers of whites and the numbers of minority-group members at the top and the bottom of the score ranges for those who submitted PA-15s had already been observed by the plaintiffs in this case, as shown in a table in their complaint. Table B-1 is more detailed than the information presented by the plaintiffs and is different in that the men are ranked according to their raw exam scores rather than according to their list number on the eligibility list.

The data for exam #8046 (Table B-2) are so similar that we will not consider them in any detail.

We also tabulated counts by list number rather than decile. The results were essentially the same, except that blacks and Hispanics were shifted slightly toward the top of the eligible list. This reflects the fact that 32 percent of the blacks and Hispanics who submitted PA-15s were veterans, while only 23 percent of the whites were. Therefore, the granting of veterans' credits does not act to the detriment of minority groups.

Appendix C

QUESTIONNAIRE SURVEY

Our questionnaire postcard and cover letter were sent by first-class mail, in envelopes addressed by computer, to all the subjects of this study except 117 who had military addresses* or unknown addresses.

For exam #8046, 1026 questionnaires (25.3 percent) were returned by the post office as undeliverable, and 593 were returned with usable answers (19.6 percent of delivered questionnaires).** For exam #0013, 825 questionnaires (13.4 percent of those mailed) were undeliverable, and 1584 usable responses were received (29.7 percent of delivered questionnaires). As shown in Table C-1, the response rate for exam #8046 was consistently higher among those who failed the exam than among those who passed, but there were no systematic differences in response rate by decile for exam #0013. We attribute this partially to the fact that some of the men who passed exam #8046 were appointed policemen, and they had a lower response rate.

We had two reasons for sending the questionnaires to subjects whose race was already known. First, we wanted to check the truthfulness of questionnaire responses; and second, we wanted to estimate response rates by racial group.

We rediscovered the truism that race is a subjective matter, so that some subjects who were labeled white or black by the Police Department considered themselves Hispanic, and vice versa. In general, we accepted the subject's own statement as to his ethnicity, except for a few who appeared to be lying to us. These were rechecked with the Police Department. The result was that on exam #8046, 8 subjects out of 134 whose race was provided both by the Police Department and their questionnaire response had given us erroneous information on the questionnaire.

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*The assumption was that these men had left military service, since they had indicated by applying that they wanted to join the Police Department. To check that questionnaires sent to military addresses were unlikely to be returned, we mailed 28 questionnaires to military addresses. Of these, only one was returned by the addressee.

**In addition, some questionnaires were returned with what we euphemistically call "unusable answers."

Table C-1

RESPONSE RATE FOR QUESTIONNAIRES

Decile	Score	Exam #8046			Exam #0013			
		Questionnaires Delivered	Usable Responses	Response Rate (%)	Score	Questionnaires Delivered	Usable Responses	Response Rate (%)
1	96-100	309	56	18.1	94-100	528	165	31.2
2	90-96	308	53	17.2	92-94	534	151	28.3
3	86-90	315	56	17.8	89-92	534	144	27.0
4	82-86	313	59	18.8	87-89	553	159	28.7
5	78-82	307	45	14.7	84-87	529	165	31.2
6	73-78	310	56	18.1	80-84	540	167	30.9
7	69-73	302	73	24.2	76-80	547	185	33.8
8	63-69	303	64	21.1	70-76	540	156	28.9
9	56-63	287	73	25.4	61-70	527	141	26.8
10	29-56	270	58	21.5	0-61	497	151	30.
Total		3024	593	19.6		5329	1584	29.7
Pass		1783	306	17.2		3918	1184	30.2
Fail		1241	287	23.1		1411	400	28.4

170

All of these men were white, and 6 of them had been appointed to the police force. The error rate for questionnaire responses for this exam was thus 6 percent. On exam #0013, 12 men out of 595 whose race was known from two sources provided erroneous information. These subjects were also all white, and the error rate for questionnaire responses can be estimated as 2 percent for this exam.

The questionnaire responses led us to change the racial classification provided by the Police Department for 4 subjects on exam #8046 and 28 subjects on exam #0013. (This does not include "questionable" or "unknown" changed to a correct race.) These changes represent a combination of coding errors and simple differences of opinion.

By determining how many of the men whose race was known to the Police Department responded to our questionnaire, it was possible to estimate response rates for each racial/ethnic group. The results, shown on Table C-2, indicated that the response rates for minority-group members were substantially higher than for whites. In the case of Hispanics it was possible to verify this observation by determining the fraction of subjects with Hispanic surnames who responded to the questionnaire. These figures are shown in Table C-3, which is broken down by decile. They show that the response rates for subjects with Hispanic surnames were some 45 to 60 percent higher than the average response rates. Although variations in response rate by decile were large, they did not appear to be systematic (i.e., Hispanics in high deciles did not have consistently higher or lower response rates than those in low deciles).

Because of the differences in response rates by race, the comparative numbers of white, black, and Hispanic respondents in each decile cannot be considered representative of the situation for the total group. However, if response rates do not vary systematically by decile, the exam score distribution for respondents in each racial/ethnic subgroup taken separately can be quite representative of the distribution for others in the same group. Tables C-4 and C-5, which present the counts of questionnaire respondents by race in each decile, were subsequently found to give fairly accurate indications of the exam score distributions for each race.

Table C-2

RESPONSE RATES BY RACE

Race/Ethnicity[a]	Exam #8046					Exam #0013				
	Known to PD		Return Questionnaire		Response Rate	Known to PD		Return Questionnaire		Response Rate
	Number	Percent	Number	Percent	Percent	Number	Percent	Number	Percent	Percent
White	988	84.2	102	76.1	10.3	1569	79.7	432	72.6	27.5
Black	141	12.0	27	20.1	19.2	245	12.4	101	17.0	41.2
Hispanic	44	3.8	5	3.7	11.4	154	7.8	62	10.4	40.2

[a]This is the race or ethnicity recorded by Police Department coders.

172 ow

Table C-3

RESPONSE RATES
SUBJECTS WITH HISPANIC SURNAMES

Decile	Exam #8046			Exam #0013		
	Number Receiving Questionnaire	Number Responding	Response Rate (%)	Number Receiving Questionnaire	Number Responding	Response Rate (%)
1	8	3	37.5	19	9	47.4
2	8	5	62.5	33	11	33.3
3	17	4	23.5	35	16	45.7
4	15	2	13.3	27	11	40.7
5	20	2	10.0	45	22	48.9
6	22	8	36.4	50	26	52.0
7	34	15	44.1	67	38	56.7
8	38	12	31.6	76	27	35.5
9	37	16	43.2	99	41	41.1
10	40	10	25.0	135	50	37.0
Total	239	77	32.2	586	251	42.8

173

Table C-4

EXAM #8046

EXAM SCORE DISTRIBUTION FOR QUESTIONNAIRE RESPONDENTS

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	48	14.0	4	2.4	4	4.9	56	9.4
2	90-96	44	12.8	4	2.4	5	6.2	53	8.9
3	86-90	48	14.0	4	2.4	4	4.9	56	9.4
4	82-86	46	13.4	11	6.5	2	2.5	59	9.9
5	78-82	23	6.7	19	11.3	3	3.7	45	7.6
6	73-78	31	9.0	17	10.1	8	9.9	56	9.4
7	69-73	28	8.1	29	17.3	16	19.8	73	12.3
8	63-69	24	7.0	27	16.1	13	16.0	64	10.8
9	56-63	34	9.9	23	13.7	16	19.8	73	12.3
10	29-56	18	5.2	30	17.9	10	12.3	58	9.8
	Pass	227	66.0	55	32.7	24	29.6	306	51.6
	Fail	117	34.0	113	67.3	57	70.4	287	48.4
Total		344[a]	100.0	168[a]	100.0	81[a]	100.0	593	100.0

[a]Of the 593 respondents, 58.0 percent were white, 28.3 percent were black, and 13.7 percent were Hispanic.

Table C-5

EXAM #0013

EXAM SCORE DISTRIBUTION FOR QUESTIONNAIRE RESPONDENTS

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	145	14.5	11	3.6	9	3.2	165	10.4
2	92-94	123	12.3	13	4.3	15	5.3	151	9.5
3	89-92	108	10.8	16	5.3	20	7.1	144	9.1
4	87-89	132	13.2	15	5.0	12	4.3	159	10.0
5	84-87	115	11.5	24	7.9	26	9.2	165	10.4
6	80-84	108	10.8	31	10.3	28	9.9	167	10.5
7	76-80	104	10.4	39	12.9	42	14.9	185	11.7
8	70-76	77	7.7	45	14.9	34	12.1	156	9.8
9	61-70	53	5.3	45	14.9	43	15.2	141	8.9
10	0-61	35	3.5	63	20.9	53	18.8	151	9.5
	Pass	854	85.4	167	55.3	163	57.8	1184	74.7
	Fail	146	14.6	135	44.7	119	42.2	400	25.3
Total		1000[a]	100.0	302[a]	100.0	282[a]	100.0	1584	100.0

[a]Of the 1584 respondents, 63.1 percent were white, 19.1 percent were black, and 17.8 percent were Hispanic.

Our analysis of responses to the third question on the postcard ("Did you pass the exam...?") showed that, on exam #8046, only three respondents who passed said they had failed. One of them is an appointed policeman; the other two were presumably referring to the fact that they failed the physical. On exam #0013, 25 respondents who passed said they failed. Seven respondents on #8046 who passed, and 27 on #0013, said they didn't know whether they had passed. Half of these had passed the physical, so they may have meant they didn't know whether they were going to be appointed. Of course there may be many men who did not receive our questionnaire and also don't know they passed.

Among the respondents who failed exam #8046, 24.4 percent said they had passed, while for exam #0013 only 8.3 percent said they passed. Judging from some (angry) comments written on the postcards, evidently many respondents thought the passing grade was 70, whereas it was actually 75. Another 31.0 percent of those who failed exam #8046, and 36.6 percent of those who failed #0013, said they didn't know whether they had passed or failed; several of these wrote on the postcard that they would like to know. There were no significant differences by race in the numbers answering Pass, Fail, or Don't Know.

Appendix D

ANALYSIS USING CENSUS DATA

The methodology for census-data analysis of exam score distributions was developed by John Rolph[11] and adapted to the present application by Jan Chaiken. The assumptions underlying this method are

(1) for purposes of determining a subject's race, he may be considered as having been drawn randomly from among the males of his age in his census tract, and

(2) differences in the exam score distributions among the three racial/ethnic groups are larger than differences in the distributions for a single group (e.g., whites) in different parts of a borough.

In the following, the expression "race i" refers to whites for $i = 1$, blacks for $i = 2$, and Hispanics for $i = 3$. Let

$n_{ik}(a)$ = number of persons of race i and age a in census tract k.

These numbers were estimated from 1970 fourth count census data. For each census tract, the Census Bureau reports, by age range, the number of whites, blacks, and Puerto Ricans.* Each Puerto Rican is *also* counted as black, white, or "other," depending on what race he indicates on his census questionnaire. Therefore the census data do not correspond to our definitions of the terms "white," "black," and "Hispanic," which are mutually exclusive categories. However, the Census Bureau also reports the total number of Hispanics (persons who had Spanish spoken in their home as a child),** not broken down by age, and the number of black Hispanics. We processed the census data to allocate Hispanics who were not Puerto Rican to age ranges. Then we subtracted the estimated number

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*These are defined as persons who were born in Puerto Rico or whose parents were born in Puerto Rico.

**These include some persons who consider themselves Puerto Rican but are not counted as such by the Census Bureau.

of black Hispanics in each age range from blacks in the range, and we subtracted the remaining Hispanics in the age range from the rest of the population. This provided counts in each age range for Hispanics, black non-Hispanics, and other non-Hispanics, which correspond to our definitions of the racial groups in Section III.

Under assumption (1) above, the probability that a subject of age a who lives in census tract k is of race i is

$$p_{ik}(a) = \frac{n_{ik}(a)}{n_{1k}(a) + n_{2k}(a) + n_{3k}(a)}.$$

Suppose $M_k(a)$ is the number of subjects of age a in census tract k who scored in a particular decile, and $N_k(a)$ is the total number of subjects of age a in census tract k. One might think that

$$m_i(a) = \sum_k p_{ik}(a)M_k(a)$$

is a good estimate of the total number of subjects of race i and age a in the decile, and

$$n_i(a) = \sum_k p_{ik}(a)N_k(a)$$

is a good estimate of the total number of race i, age a subjects, so that $z_i(a) = m_i(a)/n_i(a)$ is an estimate of the fraction of race i, age a subjects who scored in the decile. However, this can be seen to be a biased estimate by virtue of our assumption that subjects of different races are not equally likely to score in the decile.

Let $\mu_i(a)$ be the probability that a subject of race i and age a scored in the decile. Then the expected value of $M_k(a)$ is

$$E(M_k(a)) = \sum_{\ell=1}^{3} \mu_\ell(a)p_{\ell k}(a)N_k(a).$$

Substituting this in the expression for z_i we get

$$E(z_i(a)) = \sum_{\ell=1}^{3} C_{i\ell}\mu_i(a),$$

where

$$C_{i\ell} = \sum_k p_{ik}(a)p_{\ell k}(a)N_k(a) \Big/ \sum_k p_{ik}(a)N_k(a).$$

Therefore, letting B be the matrix inverse of C, it follows that

$$\hat{\mu}_i(a) \doteq \sum_{\ell=1}^{3} B_{i\ell}z_\ell(a)$$

gives an unbiased estimate of $\mu_i(a)$. This expression is an explicit formula for the estimate of $\mu_i(a)$ which would be obtained by performing a multiple regression to determine the best fit to the equation

$$y = \mu_1 x_1 + \mu_2 x_2 + \mu_3 x_3,$$

where the nth observation on the dependent variable y is 1 if the nth subject of age a scored in the chosen decile and is 0 otherwise, and the nth observation on x_i is $p_{ik}(a)$ for the census tract in which the nth subject lived.

However, our method of calculating the variance of the estimates is not the same as applies to regressions. Mathematically, assumption (1) means that the number of persons of race i, age a in census tract k is drawn from a trinomial distribution. Under these circumstances, it can be shown[11] that the variance of $\hat{\mu}_i(a)$ can be estimated as follows. Let $\Sigma(a)$ be the 3 x 3 matrix with elements

$$\sigma_{ij}(a) = \sum_k \frac{q_{ik}(a)q_{jk}(a)}{N_k(a)} P_k(a)(1 - P_k(a)),$$

where

$$q_{ik}(a) = p_{ik}(a)N_k(a) \Big/ \sum_{\ell} p_{i\ell}(a)N_\ell(a)$$

and

$$P_k(a) = \sum_{\ell=1}^{3} p_{\ell k}(a)\hat{\mu}_\ell(a).$$

Then

$$\mathrm{Var}(\hat{\mu}_i(a)) \doteq \sum_{m=1}^{3} \sum_{\ell=1}^{3} B_{im}B_{i\ell}\sigma_{m\ell}(a).$$

An estimate $\hat{\mu}_i$ for the overall fraction of subjects of race i in the chosen decile is found by taking a weighted average of the $\hat{\mu}_i(a)$'s over the different ages a, and the variance of $\hat{\mu}_i$ is found similarly.

The analysis was carried out by first performing the sum over k for all tracts k in a single borough. This gives an estimate of the fraction of subjects of race i in that borough who scored in the chosen decile. The calculation is repeated for each decile in turn.* Then the sums over k are performed for all tracts k in the four boroughs for which we knew the census tracts of subjects. The estimates reported in the tables in Section IV give the estimate $\hat{\mu}_i$ and the 95 percent confidence interval for $\hat{\mu}_i$ in the form $\hat{\mu}_i \pm 1.96\sqrt{\mathrm{Var}(\hat{\mu}_i)}$.

A variation on the above methodology consists of excluding subjects with Hispanic surnames and assuming that the other subjects must be either white or black. In this case we define

$$p'_{ik}(a) = \frac{n_{ik}(a)}{n_{1k}(a) + n_{2k}(a)}, \qquad i = 1, 2.$$

Then $p'_{1k}(a)$ is the probability that a non-Hispanic male of age a in

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*Actually, the computer program handles all ten deciles and the pass range in one calculation.

census tract k is white, and similarly $p'_{2k}(a)$ is the probability he is black. With the minor modification that the matrices C, B, and Σ become 2 x 2 matrices instead of 3 x 3, the calculations are the same as above. The estimates produced in this way tend to have smaller variances, since it is more common to find census tracts with $p'_{1k}(a)$ or $p'_{2k}(a)$ equal to 1 or very close to 1 than it is to find all three numbers $p_{1k}(a)$, $p_{2k}(a)$, and $p_{3k}(a)$ very close to zero or one.

Appendix E

SAMPLE DESIGN

A sample of subjects whose race was unknown after PD and questionnaire data were collected was selected for telephone interview to determine the answers to the questions in the mailed questionnaire. The objectives of collecting data from the sample were as follows:

(1) To estimate the percentage of all the subjects for each exam who were white, black, and Hispanic within ± 2 percentage points, with .95 confidence.

(2) If the percentage of subjects in a decile who belonged to any racial/ethnic group was actually more than 9 percentage points from the overall percentage of subjects who belonged to the group, to detect a significant difference between the decile percentage and the average percentage using a test at the .025 level, with .95 confidence.

(3) To assure that if a chi-square test of independence between exam score and racial/ethnic classification would fail at the .00001 level using data from all subjects, the same test using only the data from the sample would fail at the .001 level with .95 confidence.

Because our preliminary analysis of Police Department and questionnaire data indicated that a relationship between racial/ethnic classification and examination score did exist, stratifying the sample by decile led to a smaller sample size (needed to meet the objectives) than simple random sampling.

We define stratum (1,j) for j = 1, ..., 10 to consist of all subjects on a given exam whose scores lie in the jth decile *and whose racial/ethnic classification was known prior to selecting the sample*. To obtain a count of the number of subjects in this stratum, we added the number of persons whose race was known to the Police Department and the number of questionnaire respondents not included in the PD data. Stratum (2,j) consists of the subjects in the jth decile whose classification was unknown. For purposes of telephone interviews we needed to sample only from stratum (2,j).

The sizes of the strata for each exam are shown in Tables E-1 and E-2. Designing the sample also required that we estimate what the results of the survey would be. The percentages shown in Tables E-1 and E-2 as estimates for strata (2,j) were derived from the composition of questionnaire respondents who were not known to the PD, corrected for differential response rates. The sample design is not too sensitive to the exact values of the estimates, so long as they are in the right ball park.

Since the variance of an estimate of a fraction f, based on a random sample of size n, is f(1-f)/n, the larger fractions for blacks as compared to Hispanics would result in a larger variance for our estimate of the fraction black. Therefore, a sample size which met objective (1) for the blacks also met it for the Hispanics.*

The allocation of the total sample among strata was chosen to minimize the variance of the estimate of the fraction black. If n(i,j) is the number of subjects in stratum (i,j), p(i,j) is the fraction black, n is the total number of subjects, and N_j is the sample size in stratum (2,j), then the variance of the estimated total fraction black is

$$V(\hat{p}) = \frac{1}{n^2} \sum_{j=1}^{10} n(2,j)^2 \left(1 - \frac{N_j}{n(2,j)}\right) \frac{p(2,j)(1-p(2,j))}{N_j}\Bigg).$$

For fixed ΣN_j, this is minimized by taking

$$N_j \propto n(2,j) \sqrt{p(2,j)(1-p(2,j))} \ .$$

Objective (1) implies we must choose ΣN_j large enough so that $\sqrt{V(\hat{p})} \leq 0.0102$. Objective (2) can be stated mathematically as follows. Consider a decile j where p_j, the fraction black [or Hispanic], differs from p, the total fraction black [or Hispanic] by more than .09. If $\hat{p}_k$ is the estimated fraction black [or Hispanic] in the kth decile,

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*In percentage terms, the errors of the estimates for Hispanics could be larger than for blacks.

Table E-1

EXAM #8046

STRATA CHARACTERISTICS

Stratum	Count	Percent Black	Percent Hispanic
(1,1)	224	5.1	6.9
(1,2)	224	7.2	8.1
(1,3)	244	8.6	12.6
(1,4)	233	14.8	11.8
(1,5)	236	19.2	21.1
(1,6)	203	19.0	18.4
(1,7)	73	39.7	21.9
(1,8)	27	42.2	20.3
(1,9)	23	31.5	21.9
(1,10)	30	51.7	17.2
(2,1)	181	6 (est.)	2 (est.)
(2,2)	182	7 "	4 "
(2,3)	161	8 "	4 "
(2,4)	173	20 "	4 "
(2,5)	169	24 "	6 "
(2,6)	203	28 "	11 "
(2,7)	332	35 "	13 "
(2,8)	342	40 "	14 "
(2,9)	332	44 "	14 "
(2,10)	348	52 "	25 "

Table E-2

EXAM #0013

STRATA CHARACTERISTICS

Stratum	Count	Percent Black	Percent Hispanic
(1,1)	339	4.7	5.6
(1,2)	332	7.5	6.3
(1,3)	329	9.1	8.2
(1,4)	363	7.7	6.3
(1,5)	358	14.0	12.8
(1,6)	368	15.8	10.6
(1,7)	369	20.9	15.2
(1,8)	207	27.1	20.8
(1,9)	141	31.9	30.5
(1,10)	151	41.7	35.1
(2,1)	288	5 (est.)	2 (est.)
(2,2)	294	5 "	5 "
(2,3)	298	8 "	4 "
(2,4)	263	5 "	3 "
(2,5)	269	11 "	6 "
(2,6)	258	14 "	8 "
(2,7)	258	11 "	10 "
(2,8)	419	20 "	23 "
(2,9)	486	28 "	27 "
(2,10)	476	38 "	28 "

and $n_k = n(1,k) + n(2,k)$ is the number of subjects in the kth decile, then the variance of the difference between $\hat{p}_j$ and $\hat{p}$ is

$$V(\hat{p}_j-\hat{p}) = V\left(\hat{p}_j - \frac{\Sigma n_k \hat{p}_k}{n}\right)$$

$$= V\left(\frac{\sum_{k\neq j} n_k \hat{p}_k}{n}\right) + \left(\frac{n_j}{n} - 1\right)^2 V(\hat{p}_j)$$

$$= V(\hat{p}) + (1 - 2\frac{n_j}{n})\, V(\hat{p}_j).$$

We wanted to make $V(\hat{p}_j-\hat{p})$ small enough so that we were almost certain* to reject the null hypothesis $H_o: p = p_j$ at the .025 level. We would in fact reject the null hypothesis if

(A): $$|\hat{p}_j-\hat{p}| > 1.96 \cdot \sqrt{Var(\hat{p}_j-\hat{p}|\text{given } p_j=\hat{p})}$$

$$= 1.96S.$$

The probability that condition A would be found to be true after we collected sample data is the probability that a normally distributed variable with mean $|p_j-p|$ and variance $V(\hat{p}_j-\hat{p})$ will exceed $|p_j-p| - 1.96S$. To assure that this probability was larger than .95, we had to have the ratio

$$\frac{|p_j-p| - 1.96S}{V(\hat{p}_j-\hat{p})} > 1.65.$$

A computer program was written to accept as input the total sample size and the estimates of $n(i,j)$ and $p(i,j)$; it printed as output the optimal allocation of the sample, the fraction black [or Hispanic] in each decile, the standard deviation of the estimate of this fraction, each p_j-p and its standard deviation, and the value of the test ratio

*"Almost certain" means with .95 confidence.

above, which we wanted to be over 1.65 if $|p_j - p| > .09$. The total sample size and the estimated p's could be varied to select the sample.

For exam #8046, it was found that the estimated fraction of blacks in deciles 1-3 was more than 9 percentage points below the average estimate, thereby qualifying for objective (2), and deciles 7-10 qualified by being more than 9 percentage points above average. The smallest optimal total sample which met both objectives (1) and (2) contained 670 subjects, but it was found that the optimal sample containing 640 subjects met both objectives for blacks except for objective (2) in decile 7. By adding 9 subjects to the sample in decile 7, we obtained a sample of 649 subjects meeting both objectives. This proved to meet the objectives for Hispanics also. It was divided among deciles as follows: 28, 28, 28, 45, 45, 50, 105, 105, 105, 110.

For exam #0013, deciles 1-4 and 9-10 qualified for objective (2) for blacks, and the smallest optimal stratified sample meeting both objectives contained 630 subjects divided among deciles as follows: 35, 47, 44, 35, 48, 48, 48, 88, 115, 122. This sample also met both objectives for Hispanics.

These samples were then examined to see whether objective (3) was met. It turned out that the sample sizes were large enough so that the appropriate test statistic (described in Section IV) would be significant at the .001 level under any reasonable assumption about the outcome of collecting data from the sample. Therefore, objective (3) did not impose any additional requirements on the sample design.

The members of the sample were chosen by listing the subjects in stratum (2,j) in order by raw score and last digit of application number, and then generating N_j random numbers between 1 and n(2,j) by computer. (Here N_j is the sample size chosen for decile j and n(2,j) is the size of stratum (2,j).) Any subject whose position on our list corresponded to one of the random numbers was chosen to be in the sample.

Appendix F

THE TELEPHONE SURVEY

As described in Appendix E, a sample of subjects was selected whose racial/ethnic classification was still unknown after collection of data from PA-15s and questionnaires. A total of 1279 subjects, 649 for exam #8046 and 630 for exam #0013, were selected. An alphabetical listing by borough and county of sample subjects, their addresses, and birthdates (except for those who failed exam #8046) was generated. Subjects were also divided into those to whom the post office delivered questionnaires and those for whom the post office indicated inability to deliver the questionnaires (e.g., moved and no forwarding address, no such address, etc.).

A team of students from Queens College of the City University of New York were carefully interviewed and selected to participate in the telephone survey. The team attempted to obtain the telephone numbers for the subjects by using telephone directories and calling "directory assistance." Subjects who could not be located through the telephone directories or "information" were placed on a separate list. Their names and birthdates (where available) were then entered into a computer terminal in the Police Department's Stolen Property Inquiry Section which is linked with the New York State Department of Motor Vehicle Bureau Computer Operations Section in Albany. It was hoped that subjects who had moved would be located if they owned an automobile and still resided in New York State. However, the addresses in the State motor vehicle file were in many instances the same as the old, incorrect ones we already had, and therefore this technique was not as useful as we had anticipated.

In all, we were able to obtain telephone numbers for 266 sample subjects on exam #8046 (41.0 percent) and 271 subjects on exam #0013 (43.0 percent). The remaining subjects either had unlisted telephone numbers (9.4 percent of the total on #8046 and 11.8 percent on #0013), or they had no telephone, or we could not locate their current addresses.

The telephone survey team attempted to contact the subjects during the evening hours between 6 p.m. and 10 p.m., because it was thought

that they were more likely to be at home during those hours. If no one answered the telephone, calls were placed many times at different hours of the day and evening until contact was established. In many instances the subject was not at home, and the information was elicited from the person who answered the phone (usually the subject's wife, mother, or father). These secondary sources of information were used in 159 cases on exam #8046 (59.7 percent) and 132 cases on exam #0013 (48.7 percent). Although secondary sources are not usually acceptable in surveys, the nature of the questions to be asked in this case was such that relatives would know the correct answer.

The following text and questions were used by members of the telephone survey team.

Hello. Is (first name) there?

Could you tell me if you took the civil service examination for patrolman in 1970 (1968)?

If not: Check full name, 1970 (1968) address, and date of birth.

I'm calling about a questionnaire we sent you a couple of months ago. We're trying to get some information about everyone who applied to become a policeman, but a few people didn't send back their postcard.

If asked your name: give your name.

If asked who you work for: The Rand Institute.

If asked whether this has to do with the Guardians, the Hispanic Society, or the court case: Yes, we are performing a survey for both parties to the lawsuit.

If asked why there is a lawsuit, what's going to happen to the eligible list, whether appointments are being made from the list, etc.: I'm sorry but I'm not familiar with the lawsuit, I'm only making phone calls to ask a few questions.

Would you please tell me whether you consider yourself white, black, or Hispanic?

Were any languages other than English spoken in your home when you were a child? (Any others?)

(Record only if Spanish is mentioned.)

Do you know whether you passed the test or not?

If challenged, "Do I have to answer?," etc.: Your answer will be kept in confidence and will not affect your possibility of being appointed. We really do need answers from everyone.

That's all I have. Thank you very much.

Most persons we contacted were very polite and willing to give the necessary information. Many subjects paused before answering the questions about their race but gave the impression that they were proud of being white, black, or Hispanic. A few subjects refused to answer the questions, usually either because they resented being asked questions concerning their race or they felt their responses might harm their chances of appointment for civil service jobs. The total number of refusals was 5 for exam #8046 and 8 for exam #0013.

After data had been collected by telephone, the distribution of known and unknown sample subjects by decile was as shown in Tables F-1 and F-2. It is apparent that subjects in low-scoring deciles were harder to reach by telephone than subjects in high-scoring deciles. A reasonable conclusion from this observation is that blacks and Hispanics were systematically underrepresented in the data from the telephone calls. This could be checked in the case of Hispanics by considering sample subjects with Hispanic surnames. On exam #8046, 9 of 75 sample subjects with Hispanic surnames had been reached by telephone (12.0 percent), and on exam #0013, 19 of 82 were reached (23.2 percent). These compare with over 40 percent of subjects with non-Hispanic surnames reached. Therefore, the biases in the telephone survey were just as bad as those in the questionnaire survey, but in the opposite direction. That is, minority-group members were overrepresented among questionnaire respondents and underrepresented among telephone respondents.

We therefore used a combination of census and Hispanic surname data to assign races to some of the remaining sample subjects. If a sample subject had a Hispanic surname, we checked his census tract and age range to see if at least 33 percent of residents were Hispanic. If so,

Table F-1

EXAM #8046

TELEPHONE SAMPLE
DATA FROM TELEPHONE CALLS ONLY

Decile	White	Black	Hispanic	Unknown	Total
1	19	1	0	8	28
2	13	1	0	14	28
3	10	1	0	17	28
4	18	0	0	27	45
5	16	1	0	28	45
6	21	3	1	25	50
7	38	7	1	59	105
8	32	12	2	59	105
9	23	6	2	74	105
10	9	22	2	77	110

Table F-2

EXAM #0013

TELEPHONE SAMPLE
DATA FROM TELEPHONE CALLS ONLY

Decile	White	Black	Hispanic	Unknown	Total
1	21	0	0	14	35
2	20	1	0	26	47
3	17	2	2	23	44
4	15	3	0	17	35
5	20	1	2	25	48
6	17	5	2	24	48
7	22	2	0	24	48
8	23	3	7	55	88
9	35	6	5	69	115
10	11	13	8	90	122

he was classified as Hispanic. A person without a Hispanic surname was classified as Hispanic if at least 90 percent of the residents in his age range were Hispanic. (In practice, these cases all turned out to be tract-age-range combinations which were 100 percent Hispanic.)

The remaining subjects were classified as white [black] if (1) less than 33 percent of the age range in the tract was Hispanic and (2) 90 percent or more of the remaining persons in the age range were white [black].

This method was applied both to sample subjects reached on the telephone and to those not reached. The error rate for those whose race was known from the telephone was zero in the case of exam #0013 and 1.1 percent for exam #8046. In this way we succeeded in identifying the race of an additional 249 subjects on exam #8046 and 292 subjects on exam #0013.

The final tabulation of sample subjects is shown in Tables F-3 and F-4. For exam #8046, we had contacted by telephone 65.9 percent of the whites finally identified, 45.4 percent of the blacks, and 12.9 percent of the Hispanics. For exam #0013, we had contacted 53.6 percent of the whites, 38.3 percent of the blacks, and 30.2 percent of the Hispanics. This confirms the bias present in a telephone survey.

All estimates in Section IV which are described as being based on "PD, questionnaire, and telephone sample data" have been derived by assuming that the racial classification of subjects who were not identified by the PD and questionnaires was divided in the same way as that of the sample subjects with *known* race in Tables F-3 and F-4.

Table F-3

#8046 Telephone Sample

COUNTS OF SUBJECTS BASED ON DATA FROM TELEPHONE SURVEY, SURNAME MATCH, AND CENSUS TRACT CHARACTERISTICS

Decile		White	Black	Hispanic	Unknown	Total
1		22	2	1	3	28
2		20	3	0	5	28
3		19	3	1	5	28
4		31	4	0	10	45
5		29	5	2	9	45
6	Pass	17	3	3	5	50
	Fail	11	2	2	7	
7		56	17	4	28	105
8		48	24	11	22	105
9		51	19	8	27	105
10		25	37	30	18	110

Table F-4

#0013 Telephone Sample

COUNTS OF SUBJECTS BASED ON DATA FROM TELEPHONE SURVEY, SURNAME MATCH, AND CENSUS TRACT CHARACTERISTICS

Decile		White	Black	Hispanic	Unknown	Total
1		31	2	0	2	35
2		39	3	2	3	47
3		32	3	4	5	44
4		29	5	0	1	35
5		38	4	4	2	48
6		32	7	2	7	48
7		31	8	3	6	48
8	Pass	13	2	5	6	88
	Fail	33	11	8	10	
9		59	18[a]	25[a]	12	115
10		38	30[a]	32[a]	21	122

[a]In addition, one subject in decile 9 and one in decile 10 was known to be either Black or Hispanic.

Appendix G

SUPPLEMENTARY TABLES

Table G-1[a]

EXAM #0013

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	574	91.6	34	5.4	19	3.0	627	100.0
2	92-94	548	87.5	44	7.0	34	5.4	626	100.0
3	89-92	514	82.0	54	8.6	59	9.4	627	100.0
4	87-89	535	85.5	67	10.7	24	3.8	626	100.0
5	84-87	484	77.2	74	11.8	69	11.0	627	100.0
6	80-84	473	75.6	101	16.1	52	8.3	626	100.0
7	76-80	426	67.9	126	20.1	75	12.0	627	100.0
8	70-76	376	60.1	131	20.9	119	19.0	626	100.0
9	61-70	335	53.4	130	20.7	162	25.8	627	100.0
10	0-61	216	34.5	206	32.8	205	32.7	627	100.0
Pass	75-100	3670	80.3	527	11.5	372	8.1	4569	100.0
Fail	0-74	811	47.8	440	25.9	446	26.3	1697	100.0
Total		4481	71.5	967	15.4	818	13.1	6266	100.0

[a]This table is the same as Table 4 in the text, except that percentages by race are given instead of percentages by decile.

Table G-2[a]

EXAM #8046

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	365	90.1	26	6.4	14	3.5	405	100.0
2	90-96	358	88.2	40	9.9	8	2.0	406	100.0
3	86-90	343	84.7	42	10.4	20	4.9	405	100.0
4	82-86	340	83.7	54	13.3	12	3.0	406	100.0
5	78-82	305	75.3	69	17.0	31	7.7	405	100.0
6	73-78	296	72.9	65	16.0	45	11.1	406	100.0
7	69-73	270	66.7	102	25.2	33	8.1	405	100.0
8	63-69	222	54.7	126	31.0	58	14.3	406	100.0
9	56-63	251	62.0	104	25.7	50	12.3	405	100.0
10	29-56	112	27.6	170	41.9	124	30.5	406	100.0
Pass	75+	1932	82.8	280	12.0	119	5.1	2333	100.0
Fail	0-74	930	54.0	518	30.1	276	16.0	1722	100.0
Total		2862	70.6	798	19.7	395	9.7	4055	100.0

[a]This table is the same as Table 6 in the text, except that percentages by race are given instead of percentages by decile.

Table G-3[a]

EXAM #8046

ESTIMATED EXAM SCORE DISTRIBUTIONS BY RACE
DATA FROM PD AND QUESTIONNAIRES ONLY

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	358	88.4	17	4.2	30	7.4	405	100.0
2	90-96	359	88.4	19	4.6	28	6.9	406	100.0
3	86-90	355	87.7	25	6.2	25	6.2	405	100.0
4	82-86	334	82.2	49	12.1	23	5.7	406	100.0
5	78-82	282	69.6	97	24.0	26	6.4	405	100.0
6	73-78	295	72.7	66	16.3	45	11.1	406	100.0
7	69-73	197	48.7	107	26.4	101	25.0	405	100.0
8	63-69	196	48.3	115	28.6	95	23.4	406	100.0
9	56-63	227	56.1	81	20.0	97	24.0	405	100.0
10	29-56	171	42.1	149	36.7	86	21.2	406	100.0
Pass	75+	1910	81.9	257	11.0	166	7.1	2333	100.0
Fail	0-74	864	50.2	468	27.2	390	22.6	1722	100.0
Total		2774	68.4	725	17.9	556	13.7	4055	100.0

[a]This table is the same as Table 8 in the text, except that percentages by race are given instead of percentages by decile.

Table G-4[a]

EXAM #0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM POLICE DEPARTMENT AND QUESTIONNAIRES ONLY
(EXCEPT SURNAME MATCH USED FOR HISPANICS)

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	573	91.4	29	4.6	25	4.0	627	100.0
2	92-94	546	87.2	40	6.4	40	6.4	626	100.0
3	89-92	532	84.8	55	8.8	40	6.4	627	100.0
4	87-89	552	88.2	42	6.7	32	5.1	626	100.0
5	84-87	486	77.5	80	12.8	61	9.7	627	100.0
6	80-84	473	75.6	93	14.9	60	9.6	626	100.0
7	76-80	442	70.5	104	16.6	81	12.9	627	100.0
8	70-76	386	61.[illegible]	138	22.0	102	16.3	626	100.0
9	61-70	319	50.9	179	28.6	129	20.6	627	100.0
10	0-61	202	32.2	242	38.6	183	29.2	627	100.0
Pass	75+	3712	81.2	482	10.5	375	8.2	4569	100.0
Fail	0-74	799	47.1	520	30.6	378	22.3	1697	100.0
Total		4511	72.0	1002	16.0	753	12.0	6266	100.0

[a]This table is the same as Table 10 in the text, except that percentages by race are given instead of percentages by decile.

Appendix H

DATA FILES

To protect the confidentiality of the responses provided by the subjects of this study, we have separated our data into two computer tapes. Tape 1, which will be kept by the City, contains the name, address, and code number of each subject. Tape 2, to be retained by the Institute, does not have any information which identifies the subject. All computer printouts and other materials containing subject identification have been destroyed.

The formats for the data files are as follows:

Tape 1

Columns	Content
1-4	Exam number
5-9	Serial number
10-37	Subject's name
38-65	Street address
66-93	City, state
94-98	Zip code

Tape 2

Columns	Content	Codes
1-4	Exam number	8046 or 0013
5-9	Zip code	
10-15	Birth date	Month/day/year Blank = unknown
16-20	Adjusted exam score	Decimal between cols. 19 and 20
21-23	Zero	
24-27	Raw exam score	Decimal between cols. 26 and 27
28-29	Zero	
30-31	Fail code	Blank = passed written exam 11 = failed written exam

continued

Tape 2 continued

Columns	Content	Codes
32-36	Application number	
37	Veteran code	Blank = no veteran claim V = veteran D = disabled veteran
38-42	List number	
43-44	List decimal	
45-49	Serial number	
50	PD race	Blank = failed written 1 = white 2 = black 3 = Hispanic 4 = questionable 5,9 = unknown
51	Physical exam	Blank = failed written 1 = passed physical 2 = failed physical 3 = FTA (failed to appear) 9 = unknown
52	PA-15	Blank = failed written 1 = yes 2 = no 9 = unknown
53	Final status	Blank = failed written 1 = appointed 2 = rejected 3 = withdrew 4 = uncooperative 5 = pending 9 = unknown
54	Questionnaire delivered	Blank = delivered 1 = returned by post office 2 = not mailed
55	Questionnaire or telephone race	Blank = no data 1 = black 2 = Puerto Rican 3 = other Hispanic 4 = white 5 = other 6 = black Puerto Rican 7 = white Puerto Rican 8 = black other Hispanic 9 = unknown

continued

Tape 2 continued

Columns	Content	Codes
56	Questionnaire or telephone language	Blank = no data 1 = Spanish 2 = no Spanish 9 = unknown
57	Questionnaire pass	Blank = no data 1 = thinks passed 2 = thinks failed 3 = doesn't know 9 = unknown
58-59	Decile	1-10
60-61	Borough or county code (based on Zip code)	00 = Manhattan 10 = Bronx 20 = Brooklyn 30 = Queens 40 = Staten Island 51 = Queens or Nassau 52 = Nassau or Suffolk 53 = Putnam or Westchester 54 = all other New York State 60 = New Jersey 70 = Connecticut 80 = other
62	Sample code	Blank = not in telephone sample 1 = in sample
63	[Garbage]	0 or 1
64	Hispanic surname	Blank = no 1 = yes
65	Borough code (based on address match)	1 = Manhattan 2 = Bronx 3 = Brooklyn 4 = Queens 5 = Staten Island Blank = unknown
66-70	1960 census tract	Blank if unknown
71-76	1970 census tract	Decimal between 74 and 75 999999 if unknown
77-78	Corrected county code	Same as 60-61

continued

Tape 2 continued

Columns	Content	Codes
79-80	Age as of April 1, 1970	
81-82	Age range	1 = age 16 2 = 17 3 = 18 4 = 19 5 = 20 6 = 21 7 = 22-24 8 = 25-29 9 = 30-34 10 = other or unknown

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4. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala., 1972)

5. *Chance v. Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y., 1971), affirmed 458 F.2d 1167 (2d Cir., 1972)

6. *Castro v. Beecher*, 334 F. Supp. 930 (1971), affirmed in rel. part 459 F.2d 725 (1st Cir., 1972); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa., 1972); *Bridgeport Guardians v. Civil Service Commission*, Civ. No. B-457 (D. Conn., 1973); *Hogue v. Denver Civil Service Commission*, Civ. C-3693 (D. Col., 1972)

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8. Hunt, Isaac C., Jr., and Bernard Cohen, *Minority Recruiting in the New York City Police Department--Part I. The Attraction of Candidates. Part II. The Retention of Candidates*, The New York City-Rand Institute, R-702-NYC, May 1971

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POLICE DEPARTMENT 204sa

NEW YORK, N.Y. 10013

City of New York

March 3, 1972

From: Special Assistant to Commanding Officer, Personnel Bureau.

To: Police Commissioner.
Commanding Officer, Personnel Bureau.
Special Counsel to Police Commissioner.

Subject: MINORITY RECRUITMENT/PATROLMEN LISTS.

1. It appears that in the absence of some form of court action mandating hiring of patrolmen, the existing freeze will continue at least until the start of Fiscal Year 1973-74. That is sixteen months off.

2. There appears to be general agreement that existing testing, and our own past recruitment efforts, are the major roadblocks to adequate minority group representation within the Department. The former is probably unconstitutional, the latter did not truly exist until all too recently.

3. It behooves us to correct both problems in the intervening sixteen months. I recognize that serious discussions have already begun with respect to testing, and that substantial improvements have been made on the matter of recruitment. However, I have deep reservations about both efforts as they presently stand.

4. As indicated on Chart A, attached hereto, both testing and recruiting are conditioned on job analysis. Since testing must, by law, be related to job performance, it is impossible to develop a new test until we undertake a job analysis for the rank of patrolmen (the same holds true for promotion examinations). To the best of my knowledge this is not being done.

5. Chart B outlines issues typically related to recruiting and raises a number of questions which must be answered before we can embark on any recruitment drive for minorities with any sense that it will be successful. These questions must also be addressed and answered in the next sixteen months. The biggest relates to available manpower pools. This is a major study (time 12+ months, $100,000+). We have little time to lose.

6. For your comments.

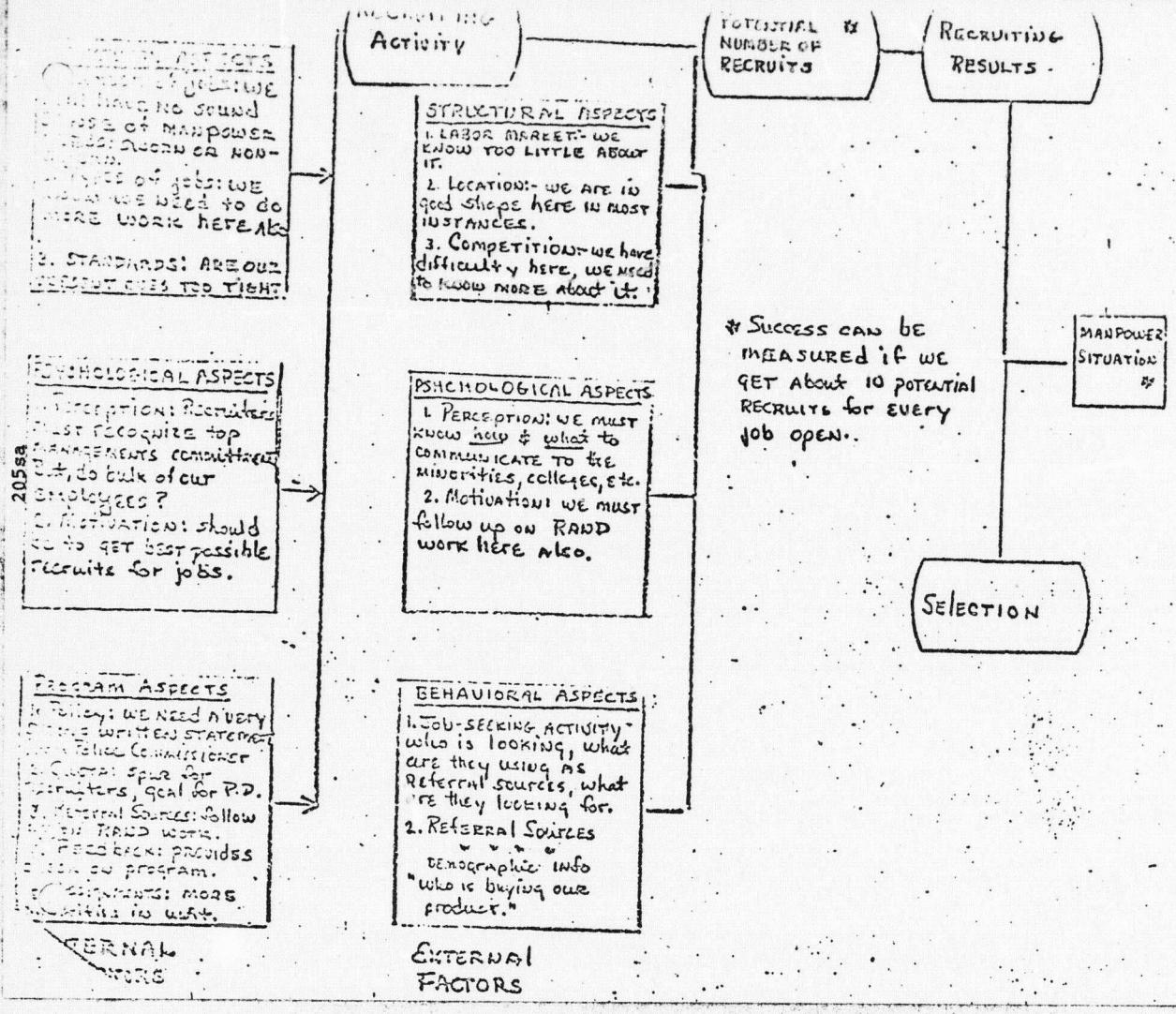
Peter Smith Ring
Special Assistant to
Commanding Officer
Personnel Bureau

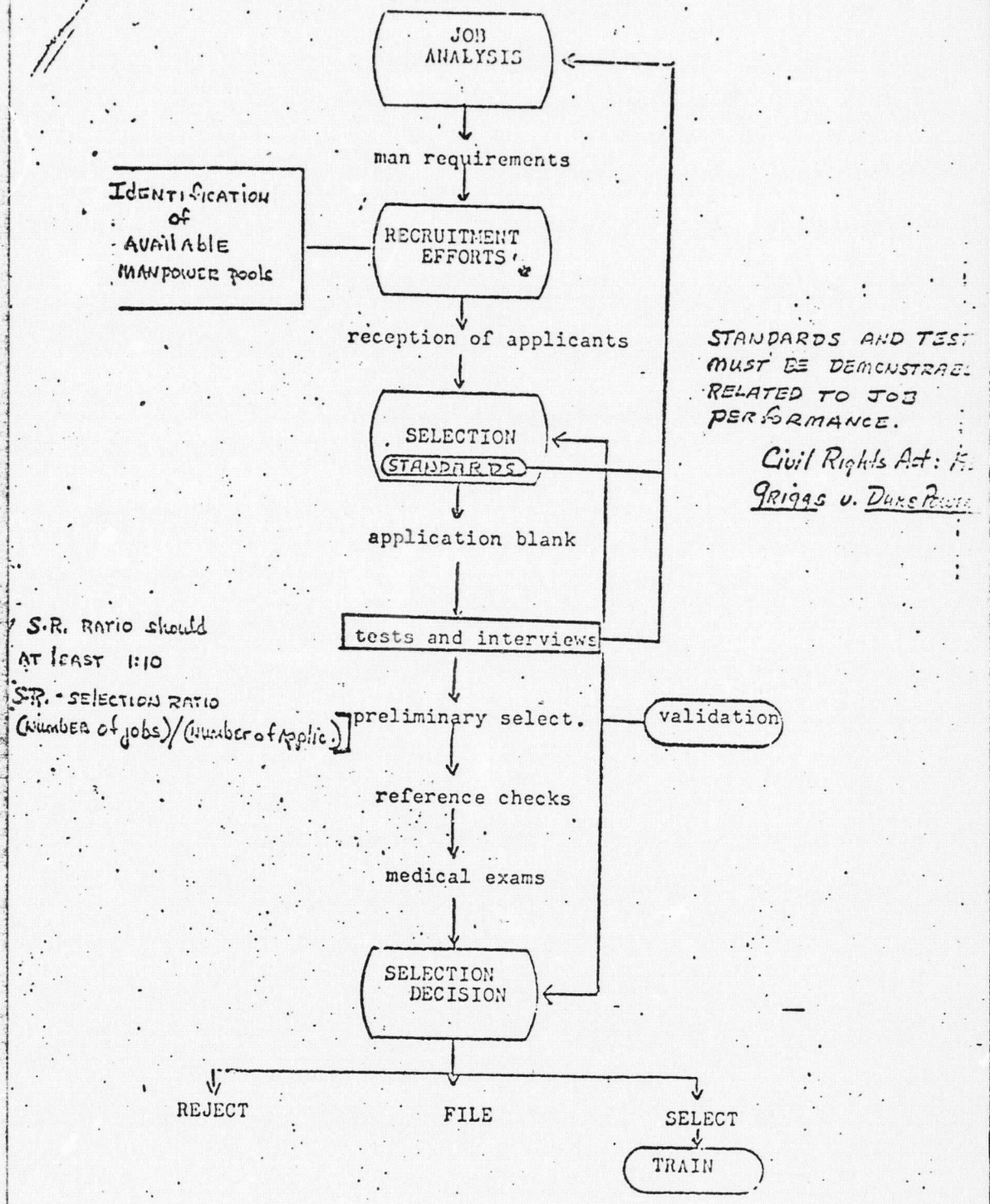
emm

0493

EXHIBIT L

BEST COPY AVAILABLE


Recruiting Activity
Potential Number of Recruits *
Recruiting Results
Manpower Situation *
Selection
* Success can be measured if we get about 10 potential recruits for every job open.
Structural Aspects
1. Labor Market:- we know too little about it.
2. Location:- we are in good shape here in most instances.
3. Competition:- we have difficulty here, we need to know more about it.
Psychological Aspects
1. Perception: we must know how & what to communicate to the minorities, colleges, etc.
2. Motivation: we must follow up on RAND work here also.
Behavioral Aspects
1. Job-seeking activity - who is looking, what are they using as referral sources, what are they looking for.
2. Referral Sources
Demographic info "who is buying our product."
External Factors
Psychological Aspects
1. Perception: Recruiters must recognize top managements committment but, do bulk of our employees?
2. Motivation: should go to get best possible recruits for jobs.
Program Aspects
1. Policy: we need a very [illegible] written statement [illegible] Policy Commissioner
2. Control: space for recruiters, goal for P.D.
3. Referral Sources: follow [illegible] RAND work.
4. Feedback: provides [illegible] on program.
5. Assignments: more [illegible] in work.
[illegible]ERNAL [illegible]TORS



TYPICAL EMPLOYMENT PROCESS

FAIR EMPLOYMENT LAW AND MINORITY RECRUITMENT AND PROMOTION

WITHIN THE

NEW YORK CITY POLICE DEPARTMENT

By: JOHN A. COSTA
Patrolman
Legal Division

EXHIBIT M

INTRODUCTION

The population of New York City in 1970 was 7,867,770. Of that number about 1,666,636 persons or about 21% are black. Also, 1,716,772 persons are Hispanics, of which 1,006,326 are Puerto Ricans; the balance of 710,446 represent 18 Latin American countries and Spain. The total New York City Spanish speaking population constitutes 21% of New York City's total population.*

The New York City Police Department has 31,017 members in the uniformed forces according to a November 1971 census conducted for the New York City Commission of Human Rights. Blacks represented 7% (2,160) and Puerto Ricans and other Spanish back ground (by surname) represented about 2.2% (699) of the total force. There are 5 Chinese, 7 "others" and 28,206 white members of the force.

The New York City Police Department is therefore 90.8% white in a city which is 42% black and Hispanic.

The above figures speak for themselves and they illustrate the gross underrepresentation of minority group members within the New York City Police Department.

In 1967 in testimony before the National Advisory Commission on Civil Disorders, Police Commissioner Patrick V. Murphy, then Public Safety Director of the District of Columbia, stated:

> "I think one of the serious problems facing the police in the nation today is the lack of adequate representation of Negroes in police departments. I think the police have not recruited enough Negroes in the past and are not recruiting enough of them today. I think we would be less than honest if we didn't admit that Negroes have been kept out of police departments in the past for reasons of racial discrimination".
> (Report of the National Advisory Commission on Civil Disorders, Bantan, March 1968, page 316)

In the fall 1971 proposal of the Personnel Bureau entitled "Comprehensive Personnel Policy for the New York City Police Department", the scalar and functional postiions held by Blacks and Hispanics in the New York City Police Department were reported.(See Appendix D and E of report). Of the 501 officers who held the rank of Captain and above, 7 were Blacks and none were Hispanic. Of the 1,081 Lieutenants, 22 were Black and 5 were Hispanic. Therefore, blacks represent only about 3% of the 3,947 superior officers although they comprise about 7% of the total force. Hispanics fared far less well. Of all the superior officers, Hispanics represent only .53% even though they comprise 2.2% of the total force.

---

*National Conference of Christians and Jews report.

In March 1968, the National Advisory Commission on Civil Disorders recommended among other things:

> "Police departments should intensify their efforts to recruit more Negroes.
>
> In order to increase the number of Negroes in supervisory positions, police departments should review promotion policies to ensure that Negroes have full opportunity to be rapidly and fairly promoted."
> (ibid page 316)

The fact that the lack of Hispanics and other minority groups was not addressed by the Commission was an oversight. Unfortunately, the Commission's approach was limited to dealing with the problems which arose in the 1960's out of the increasing militancy of the Negro minority. The militancy of the Hispanic and other minority groups is of more recent development.

In New York City the first positive efforts to bring more minorities into the Police Department antedate the Kerner Commission report by at least 2 years. In 1966, this Department, no doubt in response to impetus from a new administration which is sensitive to and recognizes the legitimate aspirations of the Negro and Puerto Rican of New York, initiated a program to supplement the recruitment efforts conducted by the City Department of Personnel. Street recruitment by black and Hispanic officers was the first positive attempt to inform the minority community of the department's "earnest desire to recruit as many qualified blacks and Hispanic candidates as was possible." This program has been described as resulting in a "dramatic percentage increase of minority group appointments." [1]

The fact is, however, this department's efforts to recruit more minority group members must, at best, be described as mere tokenism; at worst, as a complete failure. In the year 1964, of a total 1,396 appointments, 4.3% were black and 1% was Hispanic. In 1965, 3.4% and .8% of 2,081 were black and Hispanic respectively. In 1968 after two years of minority recruiting, of 4,279 appointments 7.2% were black and 3% were Hispanic. In 1969, 23% of 2,745 appointees were black or Hispanic (17% and 6% respectively). In 1970, the percentage of black and Hispanic -

1. Comprehensive Personnel Policy for the New York City Police Department, page 2

appointees dropped back to 12% (7% and 5% respectively) of 645. In 1971, due to the job freeze, no appointments were made.*

After 5 years of efforts which have supposedly dramatically increased minority group recruitment, the fact remains the New York City Police Department is still 90.8% lily white.

In recent months the patience of minority groups seeking equality of access to civil service jobs has worn thin. In city after city recruitment, hiring and promotion practices have been increasingly challenged as discriminatory. Here in New York City a preliminary injunction has been obtained against the Board of Examiners of the Board of Education enjoining all promotion examinations for the position of principal pending trial of a class action brought by Blacks and Puerto Ricans who contend that the traditional civil service examinations discriminate against them as a group. In order to get the injunction, plaintiffs were required to show a strong likelihood of success in their action and they did.

Many of the suits have received prominent attention by the news media and have stirred considerable controversy in the community especially among civil service groups. In response to this litigation and to the possibility that a significant legal trend may be developing, Deputy Commissioner in Charge of Legal Matters, Luis M. Neco, some months back posed the following question:

> "In view of the recent decisions in cases challenging civil service appointment and promotion practices as discriminatory, will the Police Department be required to take such steps as to insure appointment and promotion of far greater numbers of minority group members so that the representation of blacks and Hispanics in the Police Department will approximate that in the city as a whole?"

As a collateral question, Commissioner Neco asked:

> "Do traditional police department competitive examinations for promotion provide for fair representation of blacks and Hispanics in the superior officer ranks?"

I was directed to make the broadest possible research in the area of civil service practices and procedures and fair employment civil rights legislation and applicable court decisions

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* Therefore, this is the only year for which data exists that the representation of minorities equaled that of whites.

In the research effort I was assisted by Mr. Israel Ruiz, Jr., a third year Columbia Law student who was taking a community student project seminar course for credit and had elected to work for the Police Department through the office of Mr. Philip Lacovara, Special Counsel to the Police Commissioner. I also received research assistance from Mr. Dean Allison, a second year New York University law student with whom I exchanged source material since he was working independently on research for a New York University Law Review article on minority members in the New York City Police Department. I also gratefully acknowledge the help of Elizabeth Dubois, Esq., attorney for the N.A.A.C.P. Legal Defense Fund for her efforts in keeping me up to date on the very latest cases.

For the past few months in New York City, a committee composed of Department heads and representatives from the Mayor's Office, Police Department, Department of Personnel and Corporation Counsel's Office has been meeting regularly to develop a proposal for presentation to the Mayor to change the civil service examination and appointment process to result in appointment of more Negroes and Puerto Ricans to the police force. As Aide to Commissioner Neco, I have attended several of the committee's meetings. The committee proposal has not at this date been finalized and nothing in this report should be construed as any indication of what the final recommendation of that group will be, nor that their views are necessarily in accord with mine, nor mine with them.

This report is divided into three parts. First, I have attempted to explain the development of current trends in fair employment law and to indicate the probable future direction of the law. Second, I have examined the appointment and promotion process in use today and tried to discover where this process and the effort to recruit and advance black and Hispanic officers has clashed. The final part of this report deals with recommendations for future change.

PART I

On January 7, 1972, the United States Court of Appeals for the 8th Circuit, ruling en banc after a rehearing on the issue of a proper remedy in a class action which established that the City of Minneapolis had discriminated against blacks and other minority applicants for its Fire Department, stated:

> "...we feel that it would be in order for the district court to mandate that one out of every three persons hired by the Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired." (Carter v. Gallagher, Court of Appeals for 8th Circuit, Slip Opinion No. 71-1181, January 7, 1972, page

The Court in Carter v. Gallagher (supra) has gone further than any other appellate court to date in seeking a judgment that is constitutionally sound and yet still effective to redress members of a class for past discrimination. The single dissenting judge in Carter stated that employment preferences based on race are prohibited by the Fourteenth Amendment. This decision of the 8th Circuit is reflective of a rapidly developing case law which is going to present a profound challenge to the traditional civil service system in this country.

Carter is likely to receive further review by the United States Supreme Court this year. In my opinion, there is a strong likelihood that the decision will be affirmed. A "quota system"* for public hiring is a rather startling but not unexpected development. To understand how a court reached that result it is necessary to trace the recent development of what I call "no fault fair employment law".

As recently as 1967, the thrust of American fair employment laws could be stated as:

> "...the conduct which ultimately forms the basis of a finding of discrimination under fair employment laws is prohibited only when it is coupled with a certain state of mind. Thus, discrimination is essentially an equivocal act accompanied and inspired by the mental element of prejudice. It is the motive that distinguishes the prohibited act, not the act itself..."

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* described by the majority in Carter as "an alternating ratio".

1. Training Materials For Equal Employment Lawyers, Part 1, page . Columbia Law School Project in Fair Employment, George Cooper and Harriet Rabb, Unpublished Manuscript.

This view influenced virtually all fair employment enforcement efforts until the late 1960's, and, as a consequence, very little was accomplished. Factual problems of proof rendered the statutes and other provisions powerless against patterns and practices which grossly limited employment opportunities of blacks, women and other minority groups.[1]

In 1945, New York State enacted legislation creating the State Commission Against Discrimination (Chapter 118 Laws of 1945). The Commission was supposed to have the power to

> "eliminate and prevent discrimination in employment because of race, creed, color or national origin, either by employees, labor organizations, employment agencies or other persons..."
> (Section 290, Executive Law, McKinneys, 1951 Edition).[2]

The Commission also has jurisdiction to and power to eliminate and prevent discrimination in employment in all public agencies. (Board of Higher Education of the City of New York v. Carter, 14 NY 2d 138, 250 NYS 2d 33, 1964).

Nevertheless, in New York and other states, employment data from World War II through the 1960's comparing blacks and whites showed no significant change over the years in the ratio of black to white unemployment or comparative pay rates.[3]

Under the traditional interpretation of fair employment laws, few objective practices were challenged. The emphasis was on the language in most statutes which prohibited discrimination "because of race". Difference in treatment resulting from employment policy that made no reference to race was thought attributable to the policy itself and not to racial classification unless that policy was a mere subterfuge for specific discriminatory intent.[4]

This interpretation has been recognized to be inadequate in view of the nature of the racial discrimination in employment. This country's history of racial segregation and discrimination has produced rigid patterns and differences in housing, education, culture and employment status. Blacks and other minorities in

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1. ibid.
2. Now called the State Commission for Human Rights by virtue of 1969 Amendment - Chapter 359 Laws of 1969.
3. Op. cit page 2
4. Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, by George Cooper and Richard B. Sobol - Harvard Law Review, Volume 82, No. 8, June 1969, page 1600.

the United States, because of race, are likely to live differently than whites, have gone to inferior schools, received less cultural stimulation than whites and to have been excluded for racial reasons from many employment opportunities.

The enactment of Title VII of the Civil Rights Act of 1964, however, marked the beginning of a new interpretive approach to reform employment practices which limited the opportunities for equal employment of minorities where there was no apparent intent to discriminate.

Effective July 2, 1965, it became an unlawful employment practice for an employer:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;
>
> or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
> (Title 42, Section 2000e (21U.S.C.A. "Unlawful Employment Practices -Employer Practices".)

The following section limits the scope of "unlawful employment practice" to permit use of a merit system and ability tests.

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed intended or used to discriminate because of race, color,

religion, sex, or national origin. . "
(42 U.S.C. 2000e-2(h)

The next section important to this discussion makes it clear that Title VII was not intended to provide for preferential treatment to correct a percentage imbalance. It reads:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual to to any group because of the race, color, religion, sex, or national origin or such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area".
> (42 U.S.C. 2000e-2(j)

However, by virtue of Section 2000e (Title 42 U.S.C.A.) the term "employee" within the meaning of the Equal Employment Opportunity Act was restricted to mean (insofar as pertinent):

> "a person engaged in an industry affecting commerce ...and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof..."

Therefore Title VII of the 1964 Civil Rights Act has had no applicability to employment by municipalities. Nevertheless, the act has great importance because, as we shall see, its rationale and court interpretation has in large measure been adopted as law in civil rights cases involving job discrimination by governmental agencies.

The first major Title VII case to reach the United States Supreme Court was Griggs v. Duke Power Company, _____ U.S._____, 28 L.Ed. 2d 158, 91 S.Ct., _____March 8, 1971.

Plaintiffs were Negro employees who, pursuant to Title VII of the Civil Rights Act of 1964, challenged Duke Power Company's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant.

At issue was the effect of Section 703(h) of Title VII which authorizes the use of any professionally developed ability test, provided that it was not designed, intended, or used to discriminate. The District Court found, and the Court of Appeals agreed, that plaintiffs had not shown a discriminatory purpose in the adoption of the diploma and test requirements. The Court of Appeals also held that, absent such discriminatory purpose, use of the requirements was permitted. The Court of Appeals rejected the claim that because a disproportionate number of Negroes were rendered ineligible for promotion, transfer and employment, the requirements were unlawful unless shown to be job related.

The jobs in question had formerly been filled only by white employees as part of a longstanding practice of giving preference to whites. The Duke Power Company had abandoned its policy of restricting employment of Negroes on July 2, 1965, the date on which Title VII became effective. On that date it instituted the requirement for testing and high school education. The District Court found that while the company previously follow a policy of overt racial discrimination in a period prior to the act, such conduct had ceased.

The United States Supreme Court reversed the decision of the Court of Appeals. The Court stated that the objective of Congress in the enactment of Title VII was:

> "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group over other employees".
>
> "Under the Act, practices, procedures or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices". (28 L.Ed. 2d 158,163)

The Supreme Court further stated that Title VII:

> "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

> an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." (Emphasis added) (supra, page 164)

Moreover, the unanimous decision of the court (one Justice took no part in its consideration) was that Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Specific findings in the Griggs case were that the selection devices used by Duke Power Company were not shown to bear a demonstrable relationship to successful performance of the jobs for which they were used and had been adopted without meaningful study of their relationship to job performance ability.

The Court in Griggs also stated that the Equal Employment Opportunity Commission's (E.E.O.C.) Guidelines interpreting section 703(h) were entitled to great deference. The Guidelines issued in August 1966, and updated in August 1970, provided that employers using tests have available

> "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the jobs for which candidates are being evaluated". (29 CFR sec. 1607, 35 Fed.Reg. 12333 [August 1, 1970] at section 1607.4(c)

The Supreme Court also felt that the legislative history of section 703(h) supported the E.E.O.C.'s construction requiring that employment tests be job related.

The Griggs case is particularly significant to civil service because of its traditional reliance on competitive testing for appointment and promotion. This is so, despite the fact, previously mentioned, that Title VII is specifically not applicable to state and municipal agencies. First, there is presently pending the U. S. Congress (S.2515-Cal. No. 412)* a bill which will extend Title VII coverage to municipal workers. Secondly, notwithstanding the non-applicability of Title VII, the underlying rationale has influenced decisions of courts where municipal hiring practices have been challenged as discriminatory.

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* The House has passed a bill without amendment to extend E.E.O.C. coverage to municipalities. The Senate has voted down a floor amendment which would have eliminated Title VII coverage of municipal and state workers from its bill. The prospect for the final enacted version to extend E.E.O.C. coverage to municipal workers is excellent according to Pat Shakow, Legislative Aide to Senator Javits.

In 1968 in Jones v. Alfred Mayer Company, 392 U.S. 409, (1968), the Supreme Court resuscitated the Civil Rights Act of 1866 with a holding that its prohibitions applied to racial discrimination by private persons in the sale of property. The Court rejected the argument that the 1964 Civil Rights Act had superseded the 1866 Act in the area of fair housing. The section of the 1866 Civil Rights Act upon which the holding rests provides

> "All citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property". 42 U.S.C. 1982

It was not long after the Jones case (supra)that another post-Civil War Civil Rights section was used to challenge alleged racial discrimination in employment by private persons. Sanders v. Dobbs Houses, Inc. 431 F. 2d 1097 (5th Cir. 1970); Walters v. Wisconsin Steel Works, 427 F. 2d 476 (7th Cir. 1970); Washington v. Baugh Construction Co. 313 F. Supp. 598 (W.D. Wash. 1969); Clark v. American Marine Corp, 304 F. Supp 603 (E.D.La. 1969); Dobbins v. Local 212 I.B.E.W., 202 F. Supp.414 (S.D. Ohio 1968). The section that formed the substantive basis for federal jurisdiction in the above cases provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and procedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties taxes, licenses, and exactions of every kind, and to no other". (42 U.S.C. 1981)

Arguments that the simple provisions of the 1866 Act should not be given a vitality which renders the 1964 Act superflous have had no greater weight with regard to racial discrimination in employment than they have with regard to racial discrimiantion in the sale of housing.[1]

Another section of post-Civil War Civil Rights legislation has been held to provide a remedy for discriminatory practices in state employment. This statute provides:

1. Training Materials for Equal Employment Lawyers, George Cooper and Harriet Rubb, Part I, page 5, unpublished manuscript prepared for Columbia Law School.

"Every person who under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress". 42 U.S.C. 1983

Because of the requirement that the deprivation of a right, privilege or immunity be done under color of law by a "person", the above statute has been applied primarily to officers of public agencies. An important case on this point for this discussion is Penn v. Stumpf, 308 F. Supp. 1238 (1970).

Penn was a class action seeking declaratory and injunctive relief alleging discrimination in employment by the City of Oakland Police Department. Defendants were the Commissioner of the Oakland Civil Service Board, the Personnel Director and the Chief of Police. Plaintiffs represented the class of all Negro, Mexican American and Spanish surname and other minority group members who, (1) had been denied or would be denied appointment as police officers because of discriminatory procedures used to select policemen and (2) those who would be eligible for employment but were unaware of or unable to accept such opportunities because of a discriminatory recruiting program surrounding selection of policemen.

Defendants moved to dismiss on the grounds that the suit was in essence a suit against the municipality of Oakland and as such was not maintainable under 42 U.S.C. Section 1983 and also that the plaintiffs had not made out a prima facie case of racial discrimination.

On the issue of jurisdiction, the Court stated that where the relief sought was in the nature of a declaratory judgment or injunction, rather than for damages, there was no sound reason to immunize municipal officials from suit under the Civil Rights Act.

Plaintiffs alleged that hiring and recruiting of officers the Oakland Police Department was discriminatory to members of minority racial and ethnic groups because:

1. Members of the department doing the recruiting were virtually all white and had not been screened for knowledge of non-Caucasian culture or for the presence of possible racial or ethnic biases;

2. The recruiting activities did not take into account the cultural differences in non-Caucasian communities; and

3. The written mental ability test discriminated against minority group applicants.

Plaintiffs also cited statistics which showed a marked discrepancy between the percentage of the Oakland population as a whole which was non-Caucasian and the percentage of non-Caucasian employees in the police department. It was further contended that this showing amounted to prima facie proof of discrimination in hiring.

On their motion to dismiss, defendants contended that the same procedure was followed to select recruits for the Oakland Police Department no matter what the racial or ethnic background and therefore, no group or class was discriminated against. Defendants also contended that the testing and interviewing procedures were "neutral", and if more Caucasians became policemen than did Negroes or Spanish surname applicants, it was the result of the fact that Caucasians tend, on the whole, to have "better" educational and cultural backgrounds than do non-Caucasian applicants.

The District Court denied the defendant's motion. With respect to the use of intelligence tests the court, citing a law review article,* stated:

> "While general intelligence tests are a commonly used method of screening applicants in many phases of public and private employment, recent studies on culture differences have made the validity of such tests increasingly suspect". 305 F. Supp. p. 242

The court also cited the District Court opinion in Griggs v. Duke Power Company, 292 F. Supp. 243 (1968) as requiring, as a minimum, that any tests used be professionally developed. Since plaintiffs had alleged that the tests in question had not been professionally developed or otherwise validated and given the striking statistical discrepancy between the total percentage of non-Caucasians in the Oakland community and the total percentage of non-Caucasians in the Oakland Police Department**, the Court stated there were sufficient allegations

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* G. Cooper and R. Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion", 82 Harv. L. Rev. 1598, 1643-1643 (1969)

** The Negro population of Oakland was between 32% and 45%; the Negro population of the Police Department was between 3% and 4%.

of discrimination to support the complaint. The Penn case was apparently settled or abandoned by the plaintiffs as there was no further report of it.

Nevertheless, it has been firmly established there is a federal forum available to classes of persons experiencing discrimination in employment by public agencies, albeit, the proper defendant must be an officer of a concededly public agency. See Carter v. Gallagher, 3 C.C.H. Empl. Prac. Dec. Section 8205 (D. Minn., March 9, 1971) - Fire Department; Arrington v. Mass. Bay Transportation Authority, 306 F. Supp. 1355 (D. Mass. 1969) - Transit Wrokers ; Jackson v. Wheatley School District No. 28, 430 F. 2d 1359 (8th Cir. 1970) - School Boards; Chiaffitelli v. Dettmer Hospital, Inc., 437 F. 2d 429 (6th Cir. 1971), Mizell v. North Broward Hospital District, 427 F. 2d 468 (5th Cir. 1970), Cypress v. Newport News General and Nonsectarian Hospital Assoc., 375 F. 2d 648 (4th Cir. 1967) - Public and semi-public hospitals; Johnson v. Louisana State Employment Service, 301 F. Supp. 675 (W.D.La. 1968) - State employment services; Castro v. Beecher, No. 70, 1220 (W. Dist. Ct. Mass. Nov. 19, 1971), Penn v. Stumpf, supra, - Police Departments.

In New York City the first action alleging racial discrimination in civil service employment which is traceable to the doctrine enunciated in Griggs is that of Chance v. Board of Examiners and Board of Education of the City of New York, Dist. Court, So. Dist. 8 N.Y., 70 Civ. 4141. This case is a class action for declaratory judgment and injunction by representative plaintiffs who alleged that the selection process for the position of school principal discriminates against blacks and Puerto Rican. Trial of this action was scheduled to begin February 15, 1972. However, plaintiffs sought and were granted, on a strong showing of likelihood of success, an injunction restraining defendants from conducting promotion examinations and from promulgating eligible lists on the basis of such examinations until the trial of the issue. (Supra, 70 Civ. 4141, July 14, 1971)

On their application for preliminary injunction plaintiffs alleged that the competitive examination for supervisory position administered by the Board of Examiners discriminated against persons of black and Puerto Rican race and had not been validated or shown to fairly measure the skill, ability and fitness of applicants to perform the duties of the positions for which the examinations were given, with the result that success on the examinations did not indicate in any way that the candidate would succeed as a supervisor.

The plaintiffs pointed out that of the 1000 licensed principals of New York City public schools, only 11 or about 1%

are black and only 1 is Puerto Rican. Also, of the 1,610 Assistant Principals of New York City junior high and elementary schools, only 7% are black and .2% are Puerto Rican. Statistical surveys conducted by the parties to this action disclosed that white candidates passed supervisory examinations at from 1 and 1/2 to 2 times the rate of black and Puerto Rican candidates. Statistical data also disclosed that whites passed examinations at a proportionately higher rate in three times as many examinations as the non-whites. The court found that the probability of these results occurring by chance was less than 1.05 in 1,000. This finding was based on the expert testimony of statistical analysis of the pass/fail survey results which were not disputed. With regard to the gross aggregate pass/fail statistics which indicated that the overall pass rate of white candidates was 44.3% and that of non-white was 31.4%, the court was impressed by expert testimony that the probability of the difference being a chance result not related to the factor of race was less than one in one billion. (page 17 of slip opinion).

The court was also impressed by statistics which indicated that New York City had the lowest percentage of black and Puerto Rican Principals and Assistant Principals in its school system when compared to the cities of Detroit, Philadelphia, Los Angeles and Chicago. The court however, refused to accept as relevant evidence the racial composition of New York City on the ground that that population did not correspond with the population of the pool of candidates eligible to compete for the positions in question.

On the basis of the statistical evidence considered relevant, the District Court concluded that:

> "the examination prepared and administered by the Board for the licensing of supervisory personnel in New York City schools do have the de facto effect of discriminating significantly and substantially against qualified Black and Puerto Rican applicants". (page 23 of slip opinion)

> "...the existence of such discrimination, standing alone, would not necessarily entitle plaintiffs to relief. The Constitution does not require that minority group candidates be licensed as supervisors in the same proportion as white candidates. The goal of the examination procedures should be to provide the best qualified supervisors, regardless of their race, and if the examinations appear reasonably constructive to measure knowledge, skills and abilities essential to a particular position, they should not be nullified because of a de facto discriminatory impact". (page 23 of slip opinion)

Accordingly the court took up the question whether the examinations were "job related". Plaintiffs contended that upon a showing of discriminatory impact, the burden was on the Board to show a compelling necessity or justification for the tests having an unintended discriminatory effect. The line of cases culminating in Griggs v. Duke Power Co. was relied on to support plaintiffs contention. The District Court stated those cases arose under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, et seq., and therefore, while relevant, were not controlling. Nevertheless, the court stated:

> "where official conduct discriminates as to race it is 'constitutionally suspect', subject to 'most rigid scrutiny' and bears a 'very heavy burden of justification' .."

On the strength of the above authorities and since the situation was parallel to that in Griggs, the court was

> "satisfied that where, as here, plaintiffs show that examinations result in substantial discrimination a strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given."
> (page 26 of slip opinion)

By its discussion of the evidence with respect to the validity, reliability and objectivity of the examinations used by the Board of Examiners, the District Court's opinion makes it clear that the Court was aware of and considered the question in light of professional testing principles and technical information made available by the parties.

The Court accepted the proposition that before an examination will be recognized as a reliable instrument for measuring the fitness and ability of a candidate to perform tasks demanded by a given position, the examination should be validated i.e., shown to be reasonably capable of measuring what it purports to measure. The first step is to construct an examination that will elicit information that is relevant to the job for which it is given; if so the examination has "content validity." In constructing an examination with content validity, a job analysis of the positions duties should be prepared to enable examiners to formulate questions which will measure these characteristics. Thereafter, the validity of an examination to select the best qualified candidates may be checked empirically by comparisons of later performance of successful candidates with their test scores. A significant correlation between test scores and later performance indicates "predictive validity."

If an examination has the above characteristics and it is administered objectively and free from bias, the court stated it is a "useful selection tool". (page 29 of slip opinion). The court also recognized (as did both sides) that examination procedures may have weaknesses in testing for high level executive positions.

With the above considerations in mind the court examined the structure and procedure of the Board of Examiners supervisory examinations. These examinations had been combination essay and short answer with written and oral portions.

The court found that the Board of Examiners had not taken sufficient steps to insure validity, either for content or predictiveness, even though it had recognized such an end as a desirable goal.

The court found many of the short answer and essay questions to have little relevance to qualities expected of a school supervisor, but were rather directed at testing a candidate's ability to memorize. The court found support for its analysis in the Arco study book for Principal, Assistant to Principal positions which emphasized a course of training in memorization and use of mnemonic devices. The court stated:

> "The ability to memorize and regurgitate laundry lists of pat answers is not, we hope, a true test of a candidate's qualifications for a supervisory position".
> (page 40 of slip opinion)

The District Court concluded:

1) that the examinations for supervisory personnel have the de facto effect of discriminating significantly and substantially against black and Puerto Rican applicants;

2) such a discriminatory impact is constitutionally suspect and places the burden on the examiners to show the examination can be justified as necessary to obtain persons with skills necessary to successful performance; and

3) there appeared to be a strong likelihood that plaintiffs would prevail on the merits at trial.

Therefore, preliminary relief enjoining all further examinations and appointments during the pendency of the action was granted.

The Chance case as it has thus far developed represents an indictment of the civil service selection system as irrelevant rather than racist. If plaintiffs are successful after trial of the case, the issue of the proper remedy to be applied will be decided.

This discussion was begun with the most recent statement of a Federal Appellate Court in fashioning a remedy to redress members of a class who have proved they were victims of past discrimination. At this point it is necessary to go back to the Carter v. Gallagher (Court of Appeals for the 8th Cir. Slip Opinion No. 71-1181, January 7, 1972) for analysis as to how the court arrived at its conclusion.

The Carter case began as a class action for a declaratory judgment and injunctive relief by representative plaintiffs who alleged discrimination in hiring of blacks and Spanish surname minority group members for the City of Minneapolis Fire Department.

The District Court found that it had jurisdiction under 28 U.S.C. 1343(3) and (4), that the practices and procedures of the Minneapolis Civil Service Agency over a period of 25 years had involved a pattern or practice of racial discrimination against minorities in violation of 42 U.S.C. 1981 and 1983 and that an affirmative action plan used for the last two years had not eliminated the effects of such discrimination. The court also concluded that it had the power to issue a decree which would eliminate the continuing effects of past discrimination. In addition to other relief, the District Court ordered the absolute preference in the hiring of 20 minority fire fighters and granted an injunction to prevent application of local laws requiring certification of eligible employees on the basis of their relative standing on competitive examinations. (3 E.P.D. 8205, U.S. D. Ct. Minn., March 3, 1971).

On appeal from the District Court, an 8th Circuit Court of Appeals three judge panel modified the judgment. It affirmed the judgment except that portion which granted absolute preference in the hiring of 20 minority group members (3 E.P.D. 8335 - U.S. Court of Appeals, 8th Cir., No. 71-1181, Sept. 9, 1971). The court stated that a federal trial court had power in the exercise of its equitable powers to fashion a remedy which would eliminate the present effects of past discrimination as well as to bar like discrimination in the future, but it was in error for a court to require municipal officials to give absolute preference to 20 minority applicants who met the qualifications for the position under the standards as revised in the judgment of the District Court. This type of preference, according to the Court, would

amount to reverse discrimination against white applicants whose qualifications were found to be superior to those of minority applicants and who, but for the minority preference requirement, would be entitled to priority in employment. (3 E.P.D. 8339)

A petition for rehearing of the case before the 8th Circuit en banc was granted solely on the issue of preference in hiring as a remedy to correct for past discrimination. (Court of Appeals for 8th Circuit, No. 71-1181, Jan. 7, 1972). The Court voted 8 to 1 to modify the view of the previous two-to-one decision of the three-judge panel and gave its approval for the District Court to formulate an order which would provide for the hiring of one minority member out of every three qualified persons until 20 minority persons have been hired. (page 9 of slip opinion).

One justice who sat on the first appeal panel changed his position and voted with the majority on the rehearing. The sole dissenting judge stated that while the one out of three preference provision would not discriminate against as many white applicants as an order for absolute preference, it would still give some minority persons preference over white applicants with superior qualifications. He was of the opinion that this formula still deprived persons of constitutionally guaranteed rights. (pages 11 and 12 of slip opinion).

The majority placed heavy emphasis on the following considerations in ordering one out of three minority preference:

1) Use of mathematical ratios as a starting point in the process of shaping a remedy is not unconstitutional; [citing Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 125 (1971)]

2) Because of past discrimination it is not unreasonable to assume that the minority community would still be reluctant to apply for employment absent some positive assurance that if qualified, they would be hired on more than a token basis;

3) Because of the absence of validation studies (established by the trial court), it is speculation to assume that the qualifying test, besides separating applicants, also ranks qualified applicants with precision, statistical validity and predictable significance; and

4) A one-out-of-three ratio is appropriate given the substantial minority population of Minneapolis. (6.44% including 4.3% black population).

Jurisdiction in the Carter case was based on the following Federal statutes:

28 U.S.C. 1343 "Civil rights and elective franchise"

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
(2) To recover damages from any person who fails to prevent to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote".

28 U.S.C. 2201 "Creation of remedy".

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such".

28 U.S.C. 2202 "Further relief".

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment".

42 U.S.C. 1981 "Equal rights under the law".

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other".

42 U.S.C. 1983 "Civil action for deprivation of rights".

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

I previously indicated that section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(j) limits the Equal Opportunity Employment Act to remedies which do not involve preferential treatment to correct for percentage imbalance. However, in suits challenging municipal or state government hiring practices, section 2000e-2(j) is no bar to a remedy which would provide for preferential hiring. The Carter case and others like it are predicated on section 1981 of the old Civil Rights Act and the District Court sitting as a court of equity has wide power to fashion relief enforcing the mandate of Congress and the Constitutional guarantees of Equal Protection of the Law.

Furthermore, even in Title VII (Civil Rights Act of 1964) cases courts have ordered unions and employees to hire or recruit on a percentage or ratio basis even though the victims of discrimination are not identifiable as specific individuals. See U. S.vLocal No. 8 et al, 315 F. Supp 1202 (W.D.Wash. 1970); Local 53 of Int. Ass'n of Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969); U.S. v. Central Motor Lines, Inc., 325 F. Supp 478 (W.D.N.C. 1970). Also see Contractors Association of Eastern Pa. v. Secretary of Labor- 442 F. 2d 159 (3rd Cir. 1971) (upholding the "Philadelphia Plan" under executive order #11246 for percentage minority employment goals.)

In Carter the court referred to the above group of cases and recognized that none involved an absolute hiring

preference; a remedy which "would operate as a present infringement on those non-minority persons who are equally or superiorly qualified for the fire fighters positions". A reasonable ratio for hiring minority persons who can qualify under the revised standards for a limited period of time until there was a minority representation consistent with the population mix in the area was conceived by the Court as the way to accomodate the conflicting considerations. The Court felt that this did not constitute a "quota" system because it would terminate when the court's order was implemented.

A recent class action brought in Massachusetts against the Civil Service Commission and Commissioner of Police in Boston is interesting to discuss for the approach used by the plaintiffs to show discrimination and for the approach taken by the court in deciding the issues. This is the case of Castro v. Beecher, U.S. Dist. Court, Mass, 70 Civil 1220 W, Nov. 17, 1971. It was a class action based on 42 U.S.C. 1983 in which the plaint alleged that defendants were engaging in a policy and practice of invidiously discriminating against blacks and Spanish surnamed persons in the recruitment and appointment of policemen. The practices alleged to be discriminatory were:

1) furnishing on a discriminatory basis information about police employment opportunities;
2) establishing educational requirements not bearing upon any legitimate job qualifications;
3) requiring police applicants to submit to a written examination which had not been validated as predictive of successful job performance in the position of policeman; and
4) requiring police applicants to submit to other miscellaneous job requirements, such as a height test and swimming test.

The Court found no evidence of invidious discrimination and viewed the controversy in the following manner:

> "What is factually in issue is whether defendants' standards and procedures for the recruitment and hiring of policemen are significantly related to a policemen's successful job performance, and, if not, whether, as the complaint alleges, they operate as part of a policy, that is, as elements in a course of conduct, which objectively has the consequence of disqualifying black and Spanish surnamed actual and potential police applicants at a substantially higher rate than the generality of white applicants". (page 30 of slip opinion).

The court refused to accept the plaintiffs contention that since the population of blacks in Boston was 9% in 1960 and 16.3% in 1970 and the respective figures for blacks in the Boston Police Department were about 2% in 1960 and 3.6% in 1970, a prima facie case of racial discrimination was established. (page 6 of slip opinion) However, the court did state that such a "substantial discrepancy invited inquiry" (supra, page 4) Although the situation was not viewed as a prima facie showing of discrimination, the court nevertheless felt it necessary to consider in detail the challenged practices.

The court disposed of the allegation of failure to apprise plaintiffs of employment opportunities. The court found that each representative plaintiff had known about police employment opportunities and they did not have standing to raise the issue on behalf of unrepresented members of the alleged "uninformed class". Nevertheless, the District Court stated the specific grievance was not true because the Civil Service Commission had posted in its own offices, city and town offices, and in Boston police stations, notices of pending police examinations. The court found the "formal notices were adequate and non-discriminatory". (supra, page 8). The court further stated there was no duty in the absence of a court order, to take affirmative measures directed at minority groups to encourage them to apply for employment. (supra, page 9)

With regard to the statutory requirement of a high school diploma or equivalency certificate for appointment to the police department, the court found that the "requirement is obviously significantly related to job performance as a policeman" "Policemen, unlike the firemen involved in Carter v. Gallagher [supra]...are in a calling in which book knowledge is an important element..." (supra, page 10)

That the Massachusetts statute was enacted subsequent to the Crime Commission's report* recommending that every police department require that all recruits have a high school diploma and ability to do college work, provided the District Court with evidence that the requirement was adopted after "meaningful study" of the requirement's "relationship to job performance ability" [citing Griggs v. Duke Power Company, supra]. The fact that no validation study was undertaken was deemed irrelevant. (supra, page 10).

As to the challenge to the 5'7" height requirement, the court stated none of the plaintiffs had standing. The only plaintiff under 5'7" had "never passed a police entrance examination". However, the court assumed the issue was properly before it and felt that while height was not determinative of fitness to be a policeman, it was significantly related to fitness to be a policeman because:

*Report of the National Advisory Commission on Civil Disorders.

> "policemen of average height may not be more effective than a short one in persuading children, drunks, rioters and obstreperous persons to obey promptly, he may not be physically stronger, and he may not even look more impressive in a police parade." (supra, page 11)

Regarding the challenge to the swimming ability requirement, the District Court held:

> "Ability to swim at least 100 yards has a demonstrable relation to general fitness, to physical courage, and to effectiveness in certain types of emergency rescue." [Therefore] "...a 100 yard swim test has a significant relation to job performance by policemen even if in the particular community where the job is to be performed there is little water..."

The court viewed the written examination as the principal grievance of the plaintiffs. The court found the tests were 100 multiple choice questions, general intelligence type with minimum passing grades of 70% arbitrarily set. They were prepared by persons without any academic or other training with respect to test design or police selection and no attempt was made to relate the questions to an occupational analysis of a policeman's job or to the successful performance of that job or to training programs for that job. There was no evidence of advance validation for the tests, nor was any later attempt made to prove by empirical validation that the tests had predictive validity. (supra, pages 12-14)

Since the evidence disclosed that only 25% of black candidates and only 10% of Spanish surnamed candidates passed while 65% of the others passed, the court concluded that the tests in question "were not rationally or empirically significantly related to the capacity of applicants to be trained for, or to perform a policeman's job". (supra, page 16) The Court further found that the examinations were discriminatory against minorities which do not share the prevailing white culture and hence deprive plaintiffs of equal protection of the laws. (supra, page 17)

The relief ordered included enjoining further use of old examinations lists, conducting any future police entrance examinations which are not significantly related to a policeman's job or which discriminate against any group. Also the Civil Service Commission was directed to notify each person who took a police entrance examination in the previous three years that he was eligible to take another special examination being given to redress for past discriminatory practices. (supra, p.20)

The approach taken by the Massachusetts District Court in Castro v. Beecher is not typical of those used in the great majority of fair employment cases. The judge assumed the relevancy of many of the requirements without resorting to empirical data. Also, in a memorandum filed on November 18, 1971, the court said that minority groups are not entitled to a priority or quota system so that the composition of the force will reflect the population of the city. (U S.Dist. Ct., Mass. 70 Civil 1220 W - Memorandum, November 19, 1971).

The cases discussed can be summarized in the following manner:

1) There is a Federal forum available to persons, as individuals or as members of a representative class, for redress of racial discrimination in hiring by municipal and state governmental agencies, including police departments.

2) Under Federal law where discrimination is shown, the intent of the employer is irrelevant, i.e., it is the result of the employer's act and not his motivation that is important.

3) Employer practices and procedures, although apparently neutral on their face, if they result in discrimination or have a "discriminatory impact" on employment opportunities of minorities, they may be the basis of a finding of discrimination in employment.

4) Where tests are used to select or eliminate candidates, if they significantly exclude more of one ethnic group than another, the employer must show that the selection devices employed are necessary to and do select the candidates most qualified for the position.

5) The Federal courts will consider statistical data and population figures to assess the relative success of minority candidates for civil service positions.

6) Empirical data to establish the validity, i.e., ability to successfully predict the persons best suited for the job, of the selection procedures must be shown if the practice is to withstand court scrutiny.

7) Where discrimination is shown the Federal court has wide discretion in choosing a corrective remedy including, but not limited to, the following:

a) grant injunctions against the offending practices,
b) enjoin application of local laws and rules,
c) order revised selection procedures,
d) order retesting of unsuccessful applicants after appropriate notice, or
e) order hiring of minorities on an alternating ratio.

The last remedy of requiring hiring on a ratio or "quota" system has not as of yet been sanctioned by the U.S. Supreme Court. It nevertheless represents a pragmatic approach to provide an effective corrective remedy in the situation where it has been established that an employing agency practiced discrimination over a long period of time. To merely order discontinuance of the offending practice will give the plaintiffs a fresh start but would do nothing to correct for the past abuses. Given the relatively slow attrition rates in municipal employment, it would take many years for the previously discriminated group to catch up. Such a limited order does nothing to correct for past discrimination. Ordering an agency to hire qualified members of a minority on a ratio basis does provide for quickly bringing a minority employment in the offending agency up to the level it would presumably be if no discrimination had been practiced. Of course, it can be argued that this is the practice of unconstitutional discrimination in reverse, but the situation is one which cannot be resolved without some form of discrimination. The Federal Court and ultimately the Supreme Court must decide whether it is proper to limit the remedy available to a class of persons who can prove they suffered discrimination over a long period of time for the sake of preserving the majority class' inchoate rights to seek future employment. I believe that the ratio type remedy is no less destructive of the constitutional rights of the majority than application of a prospective only remedy would be to the constitutional rights of the minority, to be restored to equality. The latter remedy should be granted where it appears that the discrimination was of long duration.[1]

1. Recently a Federal District Court in Alabama found that the Alabama Dept. of Public Safety violated the 14th Amendment by engaging in a blatant and continuous pattern and practice of discrimination as evidenced by the fact there had never been a black state trooper in the 37 year history of the patrol. Rather than order new tests or testing procedures which would take several years to implement, the court merely enjoined the defendants from failing to hire and-permanently employ one negro trooper for each white trooper until approximately 25% of the Alabama state trooper force is comprised of Negroes. The court merely stated "It shall be the responsibility of the Dept. of Public Safety and the Personnel Dept. to find and hire the necessary qualified black troopers." See Paradise v. Allen, U.S. District Court, Middle District of Alabama, Civil Action 3561-N, February 10, 1972

PART II

The Police Department Selection Process

Article 5, Section 6 of the New York State Constitution requires that civil service appointments be made on merit and fitness ascertained as far as practicable by competitive examination. Section 50 of the New York Civil Service Law provides that the merit and fitness of applicants for positions in the competitive class must be ascertained by examination prescribed by the State Civil Service Department or municipal commission having jurisdiction. Section 52 of the Civil Service law requires promotion to be based on merit and fitness as determined by examination . Section 95 of the Civil Service Law provides that:

> "no officer or officers having the power of appointment or employment shall appoint or select any person for appointment, employment, promotion or reinstatement except in accordance with the provisions of this chapter and the rules and regulations established thereunder".

Chapter 35 of the New York City Charter creates the New York City Civil Service Commission and the office of Director of Personnel. The Civil Service Commission in New York City pursuant to authority granted by the New York State Constitution and the New York Civil Service Law has established the Civil Service Rules and Regulations of the City of New York.

The following rules or parts thereof are pertinent to this discussion:

> Rule 3.4.5 - "The merit and fitness of applicants for the positions which are classified in the competitive class [including police] shall be ascertained by such examination as may be prescribed by the Director".

Rule 4.7.2 - "Appointment or promotions from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the Director as standing highest on such list who are qualified and willing to accept such appointment".

> Rule 5.3.1 - "...vacancies in positions in the competitive class shall be filled, so far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists..."

Rule 5.3.2 - "Promotion shall be based on merit and fitness as determined by examination..."

To be eligible for appointment to the Police Department a candidate must possess the following qualifications or attribut

1) Be citizens between ages of 21 and 29 years,. (adjustment for time in military service is made)
2) live in New York City or adjacent 5 counties on day of appointment,
3) 5'7" minimum height,
4) have 20/30 vision,
5) possess good character,
6) pass qualifying medical examination,
7) pass qualifying physical examination,
8) have a high school diploma or equivalency diploma,
9) possess a valid New York State driver's license, an
10) pass a written competitive examination.

All of the above qualifications as well as the applicable laws and rules are neutral on their face. Nevertheless, this department is 90.2% white despite extensive efforts to channel more of the city's 21% black and 21% Hispanic population into the recruitment process.[1] In fact, in recent years it has been estimated that as many as 33% of those who take the qualifying examination are minority group members.[2] However, the number of minority group members who emerge at the end of the selection process with appointments has never approached tha percentage. The following chart indicates the percentage of black and Puerto Rican appointments out of the total appointments for the years 1964 through 1970.

YEAR	PERCENT BLACK	PERCENT PUERTO RICAN	PERCENT MINORITY	TOTAL APPOINTMENTS
1964	4.3 %	1 %	5.3 %	1396
1965	3.4	.8	4.2	2081
1966	3.7	1.2	4.9	2156
1967	1.9	.35	2.2	3144
1968	7.2	3	10.2	4279
1969	17	6	23	2745
1970	7	5	12	645

Source: Comprehensive Personnel Policy for the New York City Police Department, report of the Personnel Bureau, October, 1971.

1. Rand Report, May 1971, page 36 (Minority Recruiting - The New York City Police Department) Annual expenditure of $150,000 by this department for 5 mobile recruiting teams.

2. Ibid, page 55

What happened to the 30% minority aspirants to reduce the successful number to as little as 2.2% of 3144 appointees in 1967? In looking for evidence to suggest an answer or answers to the above question, we should remember that if we can identify a stage or stages where significantly greater numbers of black and Hispanic candidates are excluded or drop-out, in order to justify continuation of that practice, we must be prepared to justify its relevancy or necessity (validity). If we cannot do either we must be prepared to find an alternative practice that has validity or one that does not have a discriminatory impact.

At this point it should be pointed out that New York City is not alone in having a police force which does not reflect the racial composition of its citizens. As the following chart indicates this is the situation in all the big cities:

City	Black Population	Black Police
Atlanta	51.3%	10%
Chicago	33	16.2
Cleveland	40	7
Dallas	25	2
Detroit	45	13
Los Angeles	17.9	15
Miami	22.7	11
Minneapolis	4	1
Newark	80	14
New York	31	8.5
Oakland	40	6.5
Phoenix	5	2
St. Louis	41	14.8
Washington	70	37

Source: Newsweek, "The Black Cop: A Man Caught in the Middle" August 16, 1971, page 20

If records and other data were available to indicate the race of the applicant or candidate from the time he or she took the entrance examination, it would be fairly easy to pinpoint the stage or stages at which Negroes and Hispanic persons are eliminated. Unfortunately, this type of data is not presently available*. Fortunately, there is sufficient data available to identify some of the problem spots.

Although it has been estimated by head counts that over 1/3 of those taking the entrance examinations for patrolman are black or Puerto Rican, there is no data to determine how

*It should be in the future as it is no longer illegal to keep such information if used for study purposes.

minority candidates do on the examination compared with white candidates. However, since it is widely recognized that minority groups members are more likely to belong to a lower socio-economic level and have received inferior educations than whites, it is safe to assume that blacks and Puerto Ricans (with additional language barrier) do not fare as well on the written examination. This, of course, under the doctrine developed in Griggs v. Duke Power Company, ____ U.S. ____, 28 L.Ed. 2d 158, 91 S.Ct., March 8, 1971, would not be illegal discrimination if the Department of Personnel could demonstrate that the entrance examination has predictive validity. In an attempt to learn if data to establish validity of the police entrance examination existed, I contacted Mr. Solomon Weiner of the Department of Personnel, Bureau of Examinations. At a meeting with Mr. P. Seigal of Mr. Weiner's office, I was informed that there is no data available to establish, one way or the other, that the entrance examination has predictive validity. Information of this type would be necessary to defend any challenge to the examination itself.

For the present, it appears safe to assume that the requirement that all appointees to the position of Patrolman have a high school diploma or equivalency certificate could withstand challenge even though it too would most likely exclude blacks and Puerto Ricans at a greater rate than whites. The only case found that raised a challenge to that requirement for appointment to a police department was Castro v. Beecher, U.S. Dist. Court, Mass, 70 Civil 1220 W, Nov. 17, 1971. The District Court found without much discussion that a high school diploma was related to successful job performance.

However, it has been recognized by many that college educations is a desirable minimum for police officers and it appears likely that some sort of college requirement will be established in the future for this department. Despite open enrollment in the City University of New York, college education is not available to Negroes and Puerto Ricans on the same basis as for whites. Therefore, a college requirement would probably have a discriminatory impact on minorities. To justify this impact, it would be necessary to show empirically that college training was job related to police work. This may be very difficult, if not impossible, in view of the strong tradition, considered erroneous by many, that police work is more physical than mental.

There was no data available with which to accurately assess the impact such requirements as 20/30 eyesight, possessing a driver's license and having minimum height of 5'7" could have on minority candidates. Suffice to say, these requirements would also have to be justified if it could be shown that, for instance, blacks are more likely to have less than 20/30 eyesight. The requirement to have a driver's license can be a bar

to this city's poorer residents who do not own cars. It is generally assumed that the minimum height requirement is a problem for many would-be Puerto Rican candidates. This height requirement was assumed in the Castro case to be job related but the approach was not empirical and a different result would not be surprising if evidence was presented to show that a large percentage of persons of Hispanic origin were excluded by it.

Passing the initial patrolman examination is just the first step in a process lasting many months to appointment. Fewer than 1/3 of the candidates who pass the written examination succeed in completing all the steps required to become a probationary patrolman.[1] Over 1/2 of the candidates who pass the examination do not continue to the point where they submit a completed personal history questionaire (Form P.A. 15).[2] On the average, the recruitment process lasts 17 months from the time a candidate takes the written examination to final appointment.[3]

One area where one might expect to find adverse impact on minorities is during the character investigation. It would not surprise many persons to find bigotry and racial discrimination at this stage where subjective considerations enter the process. In the notice of examination the attribute of good character is defined as follows:

> "Proof of good character will be an absolute prerequisite to appointment. The following are among the factors which would ordinarily be cause for disqualification: a) conviction of a misdemeanor or an offense, the nature of which indicates lack of good moral character or disposition toward violence or disorder; b) repeated conviction of of an offense, where such convictions indicate a disrespect for the law; c) repeated discharge from employment where such discharge indicates poor performance or inability to adjust to discipline; d) addiction to narcotics or excessive use of alcoholic beverages; e) discharge from the Armed Forces other than the standard honorable discharge. In accordance with the provisions of the Administrative Code, persons convicted of a felony are not eligible for positions in the uniformed forces of the Police Department. In addition, the rules of the City Civil Service Commission provide that no person convicted of petit larceny, or who has been dishonorably discharged from the Armed Forces, shall be examined, certified or appointed as a patrolman".

1. Minority Recruiting in the New York City Police Department, Rand Report, May 1971, page XV
2. Ibid.
3. Ibid.

The personal character investigation is entirely under the jurisdiction of the Police Department. In the Rand study, Minority Recruiting in the New York City Police Department, May 1971, this phase of the recruitment process was closely scrutini The Rand study concluded that there was no significant differenc among blacks, whites, and Puerto Ricans in the proportions appointed or rejected during the personal character investigations by the Police Department.[1] Rather, the report stated, the evidence suggested that the underrepresentation of minority group members was due to a combination of factors operating prio to the time the police initiate the character investigations.[2]

What might these other factors be? For one examination analyzed by the Rand Corporation, it was found that 2,939 applicants passed. Of those, 648 or 22% did not appear for the medical/physical examination. Another 20.3% of the 2,939 or 597 failed the medical/physical examination. The remaining 1,694 applicants were given P.A. 15 forms to complete. Of this number 1,394 P.A. 15's were processed. Three hundred applicants failed to submit completed P.A. 15 forms. The first stage at which the race of the candidate can be positively identified is when the completed P.A. 15 is submitted and the character investigation commences. We have already indicated that Rand found no evidence of racial discrimination in the investigation stage. By comparing candidates with Hispanic surnames to all other candidates Rand was able to conclude that the attrition pattern of Puerto Ricans who pas the police examination did not differ appreciabl from that of their white counterparts.[3] There was no convenient procedure for the Rand people to compute the attrition rate of blacks who pass the examination up to the time a completed P.A. 15 was submitted. However, Rand estimated that 15% or 441 of those who took the examination and passed were black. It was known that only 178 black candidates were investigated. Therefore, Rand concluded that nearly 60% of the black candidates drop out or are rejected (medical/physical examination) before the police department has a chance to undertake character investigations.[4] Rand also found that most of the attrition prior to processing P.A. 15 forms is the result of the candidates apparent lack of motivation to act during the lengthy process of recruitment and not due to rejection by the Department of Personnel of Police Department.[5]

Does this attrition have a discriminatory impact on blacks? Rand found that overall attrition prior to submitting

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1. Ibid, page 6
2. Ibid, page 60
3. Rand study, page 53
4. Rand study, page 55
5. Ibid, page 50

completed P.A. 15's was 52.5%. Rand's admittedly extrapolated estimate of black attrition for the same period was 60%. The difference in the two rates (7.5%) is not so great considering the means by which it was arrived at that it can be concluded that blacks who pass the written examination are more likely to drop out of the selection process than their white or Puerto Rican counterparts. For all groups the attrition rate is over 50%.

One conclusion that can be drawn from the data presented above is that minorities represent 30% of those who take the examination but represent a much smaller percentage of those who pass it. The written examination appears to discriminate the most against minority group members who aspire to be policemen.

Of course, there may be a more subtle influences at work prior to the examination which keeps qualified minority group members from taking it. Factors such as a minority community attitude against police work, feelings that they would not be welcome on the force, misunderstanding about qualifying requirements may have further discriminatory impact on minorities. To the extent that these attitudes have been caused or fostered bythe past actions of the white community, they are subject to corrective orders by Federal courts, including a directive to publicize new examinations to minorities. (See generally Carter v. Gallagher, 3 C.C.H. Empl. Prac. Dec. Section 8205 (D. Minn., March 9, 1971), Castro v. Beecher, supra)

The police entrance examination is the major stumbling block for minority group members who want to be police officers. Of those who make it past this barrier and receive appointments, how have they fared as a group in attaining the relatively few rankingpositions in the department?

This department was 31,017 strong in November 1971. It had 2160 blacks and 699 Hispanic officers. This represented 7% and 2.2% of the force respectively. The following chart indicates the scalar positions held by black and Hispanic (primarily Puerto Rican) officers in the New York City Police Department.

RANK	BLACK	HISPANIC	OTHER	TOTAL
Above Captain	5	0	177	182
Captain	2	0	317	319
Lieutenant	22	5	1054	1081
Sergeant	96	16	2253	2365

Source: Comprehensive Personnel Policy for the New York City Police Department, report of the Personnel Bureau, October 1971

Blacks represent only about 3% of the 3,947 ranking officers although they represent about 7% of the total force. Hispanic officers account for a mere .53% of the superior ranks in contrast to their 2.2% representation in the total force. This is significant underrepresentation of minority group members in the superior officer ranks. In view of the discriminatory impact of the entrance examination, it is reasonable to suspect that the promotion examination might be a similar impediment to blacks and Hispanics. In order to test this hypothesis fully, it is necessary to compare the relative performance of each group on promotion examinations. Of course, records of the performance of black and Hispanic officers on these examinations, just as with the initial patrolman's examination, have not been kept. Fortunately, since we are dealing with identifiable members of the department, it is possible to compile this data by examining personal files of members whose names appear on certified promotion lists. This is a laborious process requiring manual chacking of thousands of personal folders. The Personnel Research Unit of this department was able to compile the following racial breakdown of the last two (1966 and 1969) Sergeant's examinations:

1966 Sergeant's Examination*

	Total in Department (Patrolmen)	Percent of Total %	Total Eligible	Percentage Eligible %	Took Exam	Percent Eligible Taking Exam %	Passed	Percentage passed %	Promoted	Black Promoted
Black	1067	3.9	733	68.7	637	86.9	100	15.7	56	[illegible]
Hispanic	233	.86	205	86.9	185	90.2	19	10.3	11	
Other	26012	95.2	21880	84.1	16858	77.0	2887	17.1	1662	
TOTAL	27315		22318	(83.2)	17680	(77.5)	3006	(17.0)	1729	

\# Score of 75 was passing mark

1969 Sergeant's Examination*

	Total in Dept. (Patrolmen)	Percent of Total %	Total Eligible	Percent % Eligible	Took Exam	Percent Eligible Taking Exam %	Passed	Percent Passed %
Black	1834	6.6	1161	63.3	1068	92.0	14	1.3
Hispanic	560	2.4	284	51.0	251	81.4	5	2.0
Other	24943	91.0	23013	92.3	21235	92.3	705	3.3
TOTAL	27337		24458	(82.2)	22554		724	3.2

* passing mark was 600th rank with 123 ties
** the entire list is expected to be promoted by 3/31/72

Source: Personnel Research Unit, Report of December 1, 1971

The data indicates that in 1966 and again in 1969, Black and Hispanic patrolmen passed the promotion examinations at a slightly lower rate than their white collegues. For the 1969 examination Hispanic officers had the lowest passing rate; for the 1966 test black officers had the lowest passing rate. The format of the test changed from 1966 to 1969 with the establishment of a cut-off mark rather than a passing score. This did not seem to affect any one group's performance more than the others. However, it is difficult to conclude from the above figures that the promotion examinations have a discriminatory impact on minority group patrolmen. The differences in passing rates are close enough that the difference may not be significant. This is an area that needs further study.

An interesting fact disclosed by the above chart points up an obstacle which affects minority group members who have been appointed in recent years. In 1969 only 63.3% of the black patrolmen and 51% of the Hispanic patrolmen were eligible to take the examination compared with 92.3% eligibility of white patrolmen. Those ineligible were all men with less than two years on the force. The requirement that a patrolman have at least two years in the department before he can take the Sergeant examination plainly and significantly adversely affects the minority group members. Given the lengthy delays experienced in establishing promotion lists, there seems to be little justification for requiring two years minimum seniority to take the Sergeant's examination.

A comparison of the relative performance of blacks and Hispanic officers promoted to positions not requiring civil

service certification provides further insight to the effect the civil service process has on the career aspirations of this department's minority group members.

The following chart provides a racial breakdown of the detective ranks:

	Total Det. 3rd	Percent of Total	Total Det. 2nd	Percent of Total	Total Det. 1st	Percent of Total	Total Det.	Total [illegible]
Black	186	11.0	63	8.5	24	10.0	273	[illegible]
Hispanic	65	3.9	21	2.8	11	4.6	97	[illegible]
Other	1428	85.1	661	88.7	237	85.4	2326	[illegible]
TOTAL	1679		745		272		2696	

Source: Appendix D - Report of Personnel Bureau, October 1971

The above chart reveals that the representation of black and Hispanic officers in all the detective ranks exceeds their percentage representation in the force as a whole. This is in marked contrast to the other groups percentage representation in the classified positions Sergeant and above.

The following chart reveals the relative success of black and Hispanic patrolmen in being promoted to detective in comparison to all other patrolmen who were serving as detectives in the fall of 1971:

	Patrolmen/ Detective Combined	Detective	Percentage Reaching Det. Rank
Black	1992	273	13.7%
Hispanic	581	97	16.7%
Others	24208	2326	9.6%
TOTAL	26781	2695	10.0%

These figures show that black and Hispanic patrolmen have demonstrated far greater ability in attaining detective promotions than have white patrolmen. This success on the non-civil service career ladder further highlights the minority officers relative lack of success in climbing the civil service ladder. What possible factors may cause the poor performance in the classified positions?

No doubt, as previously mentioned, a major factor is the seniority requirement (two years) before an officer is eligible to take his first Sergeant's examination. In the last several years, minority representation in the department has been increasing and therefore minority group patrolmen have,

and will continue to have, as a group, less seniority. Another factor, also previously alluded to, may be that the promotion examinations themselves have a discriminatory impact on minorities. These examinations have not been validated and, as with the entrance examinations, if they in fact discriminated against minorities, and are challenged, the Federal Court will enjoin their continued use. My investigation is inconclusive as to whether police department promotion examinations discriminate against minorities.

In 1969, a black police Lieutenant sought to enjoin a promotional examination for Captain on the ground that a previous test had contained grammar questions, and was of a type that minority groups do badly on and that such questions were not particularly relevant to the duties of the police captain.[1] The State Division of Human Rights issued a probable cause order. Subsequently, the Lieutenant retired from the department without finally prosecuting his action. This issue is likely to be raised again in New York City. Thus far the only Federal case to raise the issue within the context of a police promotion examination was in Alabama.

In Allen v. City of Mobile, D.C.Ala. 4 E.P. . 7582, Dist. Ala. Civil No. 5409-69P, use of a written promotion test for sergeant that emphasized verbal skills and may have had an adverse impact on minorities was found to be permissible because the questions bore a rational relationship to the performance of police work at the supervisory level.

Another possible factor worth mentioning is related to the fact that there are relatively greater numbers of minority group detectives. A first grade detective's top salary in 1971 was $16, 425, for second grade it was $14,235 and for third grade it was $12,593. For the same period, the top money for a Sergeant was $14,235. The "promotion" from first grade detective to Sergeant would result in a salary cut of over $2000. A promotion to Sergeant from second grade detective means no raise in pay. There is less incentive to go from the detective ranks to the classified ranks because in many cases it results in loss of pay in addition to the loss of a position accorded much prestige in this department. Because there are relatively more black and Hispanic officers in the detective ranks, the salary scale and prestige of the position may be limiting the career potential of these officers more so than other members of the force. They would be less likely to study for, or seek promotion to Sergeant as they can make as much as $16,425 (same as top pay for a Lieutenant) without passing a promotion examination. However, there is no way to reach Captain ($22,289) and above without passing the Sergeant's examination.

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1. Harding v. New York City Department of Personnel and New York City Civil Service Commission, State Div. of Human Rights Case, #1 a-c-190-69 (April 9, 1969)

Seniority is a factor to be considered for its effect on the final mark and hence positions on the list of officers who have passed a promotion examination. If a candidate passes the written test, his relative ranking on the eligibility list is determined by weighting the test score (50% for Lieutenant and Captain and 60% for Sergeant examinations) and weighting seniority 40% or 50% depending on the examination in question. It is the combined weighted scores for the test and seniority that determine the candidate's standing on the eligible list.

Seniority contributes a maximum of 15 points to be added to a 75 point "performance" constant awarded to all persons eligible for promotion. A candidate receives two points for each of the first five years in rank and one point for each of the next five. The highest score for seniority and performance is 90. This score weighted at either 40% (Sergeant's examination) or 50% (Lieutenant and Captain's examinations) is combined with the written mark to produce a final mark which accounts for the candidate's position on the list of eligibles. This system of according a score for seniority has the effect of lowering the relative position on the final test of the men with the least seniority. Given the increased appointment of minority group members in recent years, they as a group would stand to lose ground in relation to white officers who as a group have more seniority.

Awards or departmental recognition is also a part of the performance and seniority component for promotion. Candidates may receive up to 10 points for departmental awards for deeds of bravery, good police work or firearms proficiency. The amount of credit varies from three points for winning the "Medal of Honor" to 1/4 point for "Excellent Police Duty". These awards are given primarily to officers who effect other than routine arrests. A superior officer or the officer himself may initiate the request. Investigation of the deed and recommendation of the type of award is made at the division level. Consequently, the standards applied vary from command to command. Traditionally, unless a superior officer takes the initiative, the streetwise and generally more senior officer will know how to properly assess his accomplishment and seek recognition. The departmental recognition system is not uniform and gives an unfair advantage to senior officers and detectives. In addition, the system of rewarding valorous acts with promotion credit does not appear to be demonstrably job-related to the supervisory or administrative ranks.

In the future there is a strong likelihood that the performance points for promotion will be replaced by some sort of evaluation system where officers will receive varying credit for promotion on the basis of past evaluations. Such a system has been proposed from the premise that "demonstrated excellence in the lower ranks is an important factor in identifying those

men and women who will function most efficiently as effective supervisors in the next higher rank".[1] This premise may or may not be true depending upon the similarity of the skills, etc., of the individual's present position and the higher rank. Any evaluation procedure which is developed must be designed with sufficient checks and balances so that minority group members are not discriminated against. If discriminatory impact does result, and the procedure was challenged, empirical data would be require to establish the predictive validity of such a system. In practice, however, experts who have studied performance evaluation systems used by other police departments, have found that performance evaluations contribute little to the overall promotion score because of the small variance in the ratings, i.e., virtually everyone is judged to be "above average".[2]

The recruitment and promotion practices for the civil service positions in the Police Department, insofar as they have apparently, if not actually discriminated against blacks and Hispanics may be summarized in the following manner:

New York City Police Department recruitment and promotion procedures, particularly the written examinations, are vulnerable to litigation charging discrimination against blacks and Hispanics. This department and the Department of Personnel will be hard pressed to show job-relatedness, relevance and predictive validity of the procedures now being used to select patrolmen and superior officers.

From conversations with persons engaged in fair employment litigation, I have gathered that such a suit charging the Police Department and theDepartment of Personnel with discrimination against Negroes and Hispanic officers is imminent and probably unavoidable. Such a suit, and I hope this point has been made obvious by this report, will have a good chance of success. The result may be a court order which will involve the courts with the administration of the Police Department for many years. Such involvement may entail a complete reversal of current plans to upgrade the educational background of police officers as well as many changes in police administration including"community control" and "decentralization".

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1. Report of Chief of Personnel - October 12, 1971, Ch.Pet. # 1818

2. Study report by Education Testing Service, "Procedures in New York City for Promoting Police Officers to Serve Lieutenant and Captain", June 1970, P. P. VII - 7

PART III

RECOMMENDATIONS

I will not indulge in fantasy and suggest to the reader that any or all of a long list of pallative remedies, if implemented, will save the day. In this class I put the following possible courses of action:

1) Develop a written examination which has validity.

This remedy is not practical for the following reasons:

a. It would take too long and success is not assured.
b. If successful, the test may still screen out blacks and Hispanic persons and therefore not correct the racial imbalance of the Department.
c. Use of a valid test would not correct for past discrimination.

2) Develop a written examination which will permit blacks and Hispanics to pass at the same rate as whites.

This examination need not be a valid predicter of future performance but so what; who would complain?* However, this type of test could be developed no more quickly than the first test and it too, would not correct for past discrimination.

3) Do the best you can in the time available to develop either Test #1 or Test #2; recruit heavily in the "Target" areas and hope for the best.

This is the course of action most attractive to the bureaucracy. It can be accomplished with a minimum of effort. It too, is too little, too late.

4) Merge the Housing Authority Police Department with the Transit Authority Police Department and the New York City Police Department.

This course of action would result in a dramatic change in the racial composition of this department. The Housing and Transit Police Departments both have a higher percentage of black and Hispanic officers. Of course, this itself would not result in the new appointment of one black or one Puerto Rican and there is a distinct possibility that both these groups would not be fooled by such a tactic.

* Except some civil service groups who would view this as yet another lowering of the standards in favor of the minorities.

5) Remove the disincentive to study for promotion that First and Second Grade Detectives experience by providing that upon promotion to Sergeant Detectives would be paid at a rate at least equal to their former pay.

This would encourage the black and Hispanic patrolmen who have been promoted to detective in proportionately greater numbers than white patrolmen, to re-enter the civil service mainstream. However equitable this course of action would be, it would not result in any dramatic increase in black or Hispanic Sergeants because it woul have no effect on the gross under-representation of blacks and Hispanics in the patrolman rank.

All of the above sugggestions would result in improved opportunity for entrance into and promotion within the Police Department for minority group members. A strong public relations campaign to let minorities know the Police Department is interest in them is also a must. Translation of a regular Patrolman's examination into Spanish with the addition of a qualifying oral or written English part, as has been successfully done in Philadelphia and Newark, would eliminate the disadvantage experienced by Puerto Ricans for whom English may be a second language. This can also be accomplished with a minimum of effort.

I am convinced that a program combining one or more of the above suggestions will be attempted in New York City. I don't think such a plan will have much acceptance by the minority community or the courts, or any real chance of success, except over a long period of years. What is needed is an action plan to change the Police Department to quickly reflect the racial composition of New York City and at the same time upgrade the educational background of the force as a whole.

It has frequently been stated that any attempt to recruit more black and Hispanic police officers and to raise educational requirements of police officers in general at the same time is impossible. There is no doubt that minority groups have not had the educational opportunities of the white majority. To require all new police officers to have some level of college training would exclude from the eligible population many more blacks and Hispanics than whites. At the same time, very few police administrators will argue against the need to professionalize police services with college trained personnel.

Thus, I recommend the following:

1) Restrict eligibility for appointment to patrolmen to persons who have completed one or two years of college at the time of appointment.

2) Establish recruitment contacts at colleges where there is the highest percentage enrollment of black and Hispanic students.

3) Establish eligible lists which will admittedly have fewer blacks and Hispanics on them.

4) The Police Commissioner and Mayor of New York City should immediately initiate a federal action pursuant to 284 U.S.C. 2201 and 42 U.S.C. 1983, for a Declaratory Judgment establishing that current selection procedures discriminate against Negroes and Puerto Ricans and to recognize that the selection process has not been validated. The PoliceCommissioner should further seek a judgment declaring that he may appoint one black and one Hispanic for each one white appointed until the black and Hispanic representation in the Police Department reflects the city population spectrum. Such a judgment would have the same effect as a judgment, as in Carter v. Gallagher; (U.S.Court of Appeals, 8th Circuit, No. 71-1181, January 7, 1972), which enjoined the application of local law and rules.

5) Pursuant to the judgment obtained, the Police Commissioner can then make appointments in accordance with the suggested alternating ratio to fill the estimated 1000 to 2000 vacancies which occur each year. In five years as many as 6600 black and Hispanic appointments could be made, and the police force would have about 1/3 minority group composition.

In the event the course of action I have suggested is not followed, I submit the PoliceDepartment and the Police Commissioner will be sued by minority groups and the Department will lose the suit and may well be ordered to appoint less qualified blacks and Hispanics on an alternating ratio. In the event the Police Commissioner is not successful in obtaining a declaratory judgment along the lines suggested, every effort to recruit more minority group members should be made. However, if a federal court refuses to permit appointments to the department on the basis of an alternating ratio, it is unlikely that, should a class action be brought, another federal court in the same circuit would enjoin appointments from list established in accordance with civil service law and rules.

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LAW SCHOOL

CENTER FOR CRIMINAL JUSTICE
AGENCY ORGANIZATION AND
MINORITY EMPLOYMENT OPPORTUNITIES

August 28, 1972

Mr. Benjamin Ward
Deputy Commissioner Community Affairs
Police Department
City of New York
240 Centre Street
New York, New York 10013

Dear Commissioner Ward:

It was my pleasure to meet you and to discuss the means of increasing the number of minority police officers in your Department.

We are attaching a commentary by Mr. Stanley Vanagunas, whom you met, that seeks to assess your minority recruiting situation at this time, and throws out some ideas for your consideration.

If we can be of further assistance, please let us know.

Sincerely,

Charles Mentkowski
Chairman of the Center

CM/ks

Enclosure

0435

EXHIBIT N

POTENTIALITIES OF INCREASED EMPLOYMENT OF MINORITY GROUP POLICE OFFICERS FOR THE NEW YORK POLICE DEPARTMENT

The comments that follow should be interpreted as an initial assessment by the Marquette Center of the minority recruiting situation faced by the New York Police Department. The views presented here are result of contacts made by Charles W. Menikowski and Stanley Vanagunas, both representing the Center, during their brief on site visit of July 27-28, 1972, at which time contact was made with Commissioner Murphy, Deputy Commissioner Ward, Inspector Henry and his staff specifically responsible for minority recruiting (under Lt. Allaway) and other members of the police department. A discussion was also held with members of the city Department of Personnel responsible for patrolmen recruiting and selection, specifically, Messrs. De Mill and Unger. The intent of this general report is to explore the ways and means of how the Marquette Center could be of assistance in the future to New York's efforts to increase minority participation in police careers.

THE OPPORTUNITIES TO ADD MINORITY OFFICERS TO NEW YORK POLICE RANKS

Needless to say, best intentions are in vain if the "realities" are such that it is impossible to significantly add minority personnel. In the short run, that is precisely the situation faced by the New York Police Department.

One such "reality" is the budget crisis which has kept the Department, as well as many other city agencies, in a "job freeze" situation for two years. For example, in December, 1970, there were 31,696 sworn personnel within Departmental ranks. The comparable figure for July 1972, was 30, 169. It appears that manpower attrition will continue at least in the interim unless alternative sources of manpower funding can be found* or renegotiated pension privileges create a substantial number of vacancies due to earlier than normal retirements. Perhaps in summary it can be stated that while for the forseeable months little new manpower will be added, the long run prognosis, in the light of the crime burdens of the city, is that eventually large numbers of new police officers will have to be employed.

Another "reality" that impacts upon the minority recruiting question is the issue raised in the litigation pertaining to the life of previously promulgated eligibility lists. (Kirtin v. Bronstein). If the end result of such litigation is that approximately 10,500 such eligibles are not permitted to expire and stand with vested priority rights to jobs on the Department, a substantial number even of the hypothetical, long run vacancies will be filled by these eligibles; the vast majority of whom apparently are whites. **

Another piece of litigation before the U. S. District Court (Southern District of New York) clouds the minority employment picture even further. Civil action has been brought by the Guardians, the Hispanic Society, et al. against the City's

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*Commissioner Murphy, for example, was quoted by the New York Times, July 28, 1972, as calling for a personnel complement of 40,000 men of which 10,000 can be funded by federal moneys.

**The 10,500 eligible figure even if retained due to an unreversable court action, in reality will mean a substantially lower figure truly certifiable for employment as police patrolmen. Perhaps 2,000 or so will eventually qualify due to attrition induced by background investigations, entry into other occupations during the waiting period. etc.

Civil Service Commission and the Department. The plaintiffs, among other petitions, seek the court to invalidate the police entry exam currently used by the city's Department of Personnel, and to abolish any existant eligibility lists. Clearly, any resultant ruling by the court in this action will have an important impact on the minority employment situation of the New York Police Department. This pending litigation, because of the directness of the issues raised, tends to preclude action until a ruling is made.

In sum, the overall circumstances bearing upon the Department vis-a-vi minority employment is such that the Marquette Center can provide assistance whose impact can be felt only in the long run. Steps can be initiated now which can have a lasting effect on increasing the number of minority group policemen within the ranks. The balance of this memorandum is intended to point to such steps as suggestions for affirmative action and as potential areas of Center assistance.

ACTION REQUIRED TO INCREASE MINORITY POLICE PERSONNEL IN THE LONG TERM

The comments below should be interpreted as exploratory. More "spade work" by the Center and discussion with Departmental personnel will be needed to realistically evaluate the implementability of the steps suggested. The question of the "implementability" is an important one, not only in the sense of whether the proposed action is compatible with civil service laws of the State and City of New York, Police Department policy, but also with the subtle, yet real, pressures that impact upon the New York Police as a large and complex organization. It is no secret that when the minority group recruitment issue is raised, sensitivities of other ethnic or fraternal police organizations are affected. While action to add minority personnel should be tempered by such considerations, since they affect the morale of the department, it should also be apparent that total abstinence

from a controversial, yet principled, stance on the minority employment question will result in no success in increasing the numbers of minority police.

1. It follows then that the first step that should be taken by the top administration of the department is a department-wide and public dissemination of a policy unequivocally stating that minority recruiting is a manpower development priority. It is suggested that concreteness be added to such a policy by the following course of action: (examples of areas for action in which the Center can assist).

(a) The existant minority Recruitment Squad should be supplemented by any new manpower required and charged with the preparation of a specific minority recruiting plan which would incorporate specific goals and strategies. The head of the minority recruitment squad should report directly to the Commissioner as to the progress of the plan and, when the job freeze is off, as to the progress of recruiting;

(b) Safe Streets assistance should be sought by the Department to engage a top-caliber advertising firm which would design a police recruiting campaign geared specifically at the minority community and which should incorporate departmental image building concepts. The planning by the Recruiting Squad and the work engaged firm should be coordinated. (Note: The Rand report pertaining to minority recruiting, which has been apparently dormant in its effect, can provide many sound ideas to the shaping of such a campaign. Also, it is worthwhile to look at the Detroit P. D. experience for suggestions as to the use of minority oriented recruiting material).

2. Even if the above recruiting steps yield a significantly increased number of applicants from the Black and Puerto Rican communities, the minority employment situation could remain at status quo (if not actually be aggravated) if these applicants are turned away by culturally unfair, bureaucratic, and inordinately prolonged screening procedures on the part of the City Department of Personnel. Consequently, Commissioner Murphy, at the first opportunity, should meet with the Commissioner of the New York City Civil Service Commission and seek the implementation of a new selection procedure for patrolmen. Commissioner Murphy could advocate, as an example, the following selection process: (Again, the Center can assist in the implementation of the suggestions)

(a) The civil service exam previously used to select patrolmen has not, evidently been validated as to its capability to predict performance on the job. In its form it has been categorized as a general ability test. (Not unlike the one used to select New York policemen in 1957; subjects of a Rand performance study. This study pointed to the lack of correlation between scores attained in this exam and police performance). Consequently, the exam should not be utilized and a new test be immediately developed which predicts police performance and which is culturally fair to minority groups. Since development and validation of a new exam takes time, the interim selection tool should be an easily administered, short test of overall mental ability purged of cultural connotations and geared to eliminate the obviously unqualified individuals in general, rather than geared to presume that it selects those that are most qualified to be police officers.

(b) Since the interim written exam would merely select out the obviously unfit, reliance should be placed upon an oral board to evaluate the more subtle perceivable individual attributes of police candidates. The oral board

should be composed of predominantly minority people;

(c) Very importantly, the Department of Personnel should be impressed that it must cease the periodic, yet infrequent, examinations of massive crowds of applicants. Recruiting and selection of police officers should be continous, yet adjusted to the manpower goals of the Department. The Police Department should be delegated the responsibility for all recruiting while the Personnel Department would merely provide the staff services required in personnel selection which, while reflective of civil service laws, should be particularly sensitive to the broader Police Department objectives. The Department of Personnel should make available it selection tools to groups of 20-50 police applicants at the call of the Police Recruiting Squad. This selection service should be expeditious and should not allow for more than a two-month period between the time an application is received and the time the applicant knows if he has been found acceptable to be employed as a police officer.

3. It is common practice for many occupations to draw their talent from manpower tools that already claim some developed skills for the occupation in question. The apprentice carpenter or toolworker is certainly not news. Paradoxically, the police profession despite its critical role in society, has up to now been relegated to select from the totally uninitiated; the guy of the street. Part of the explanation for such "unprofessional" seeking of professional manpower is perhaps attributable to the civil service reform movement at the turn of the century and its philosophy; i.e. every citizen has to have an equal break for the job paid from the public till. While in principle this is a sound philosophy, it should not, however, prevent the police community from developing its sources of manpower--its own apprentice pool.

Since the mid-fifties many larger departments throughout the country have set up police trainee programs. These generally accept as trainees, young men who have graduated from high school. They are so employed for the period preceeding their maturity required for the patrolman's position. Upon reaching the necessary age, they are appointed as sworn officers.

Regrettably, most departments require the police trainee candidate to meet the same standards as a police officer candidate; except for age, of course. While good moral character, physical fitness, high school, or equivalency are obvious requirements for a trainee, it makes little sense to examine a trainee candidate's potential for police work when he presumably will have ample time to learn and to demonstrate such potential.

It is suggested, therefore, that the filling of New York City police trainee positions should not require competitive examinations, that the traineeship positions be considered probationary posts during which the trainee is expected to demonstrate competance and character to perform as a police officer, and that the trainee, upon successful completion of his "apprenticeship" be guaranteed a patrolman's post.

Most importantly, the trainee appointments should be utilized to implement the goals of departmental manpower development policy. The police Recruiting Squad should have the responsibility to screen prospective candidates (as to moral character, minimal education, physical fitness) and to recommend to the Commissioner those selected.

For the forseable future, the vast majority of trainee positions should be filled by minority group young men and women. When such is the case, many of these youth will amply demonstrate that despite the inferior education provided to them is second-rate inner city schools and despite the stresses of a ghetto life, they stand out as high caliber material for patrolmen appointments.

The Marquette Center is prepared, as soon as requested, to work with the New York Police Department to structure the above outlined program and aid in its implementation. The brief visit by Center staff did not permit to explore other avenues leading to greater minority employment and to add more depth and perspective to the comments. As indicated earlier, this commentary is an initial summation of "potentialities". Nevertheless, it is reasonably apparent that many of the latter can become "realities" that will eventually lead to a New York police complement that is more reflective of the ethnic constituency the Department is intended to safeguard.

Height of American Male Youths of Military Age by Race, Ethnic Group, and Selected Geographic Areas, Fiscal Year 1972

Consulting Report
CR-D7-73-63
July 1973

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Human Resources Research Organization
Division #7 (Social Sciences)
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General

This report was prepared for the Office of the Assistant Secretary of Defense (Manpower and Reserve Affairs) in response to a request by the United States Department of Justice "to conduct a study of the average heights of the Spanish-Surnamed Americans, Caucasians and Blacks in the Southwest and West." This report was developed from height data of American male youths examined for Military Service in fiscal year 1972. The general data which served as a basis for this study are presented in Table 1.

The data used in this report relate to preinductees and applicants for enlistment examined for the first time. It involved some 593,000 male youths examined for military service at the Armed Forces Examining and Entrance Stations (AFEES.) The data are presented by age, race, ethnic group, and selected geographic areas.

By age, the data are shown in terms of 2-year age intervals within the military age range: 17 through 26 years of age.

By race, the examinee's race is recorded on his "Report of Medical Examination" (Standard Form 88.) The following classification by race is used by the AFEES: Caucasian, Negro, Mongolian, Malayan, and American Indian. In this report the last three racial classes were grouped as "Other Races"-- so that the racial classification used here is: Caucasian; Negro; Other Races.

By ethnic group, the examinees classified as "Caucasian" were subclassified as "Caucasian-Non-Spanish," and "Caucasian-Spanish." The subclassification was accomplished on the basis of Spanish surnames. The procedure used for identifying Spanish surnames is briefly discussed in the "Explanatory Note," and more comprehensively in a separate study prepared in connection with other projects relating to youths of Spanish origin or descent. (See "Explanatory Note.")

By selected geographic areas, in Table 1 the general data are shown separately for South-West, which includes the following States: Arizona, California, Colorado, New Mexico, and Texas. However, in presenting the height data (Tables 2, 3, and 4,) separate data are also shown for New Jersey and New York. This was done because the youths of Spanish origin living in the specified South-Western States are principally of Mexican origin, and those living in New Jersey and New York are chiefly of Puerto Rican origin. (See "Persons of Spanish Origin in the United States" March 1972 and 1971," Current Population Reports, Series P-20; No. 250, April 1972.) As shown later, marked differences were revealed in their mean heights and in their distributions by height.

As may be seen from Table 1, there were enough cases within each age, racial and ethnic group, as well as by geographic area to render the findings reliable.

Mean Heights

Height was measured without shoes. The mean heights are presented in Tables 2 and 3. In Table 2, the mean heights are shown by age, race, and ethnic groups for the United States as a whole.

As may be seen from Table 2, the mean heights of the Caucasian (Total) and of the Negro youths are practically the same: 69.2 and 69.1 inches respectively. The mean heights of Caucasian-Spanish youths and those of "Other Races" are also practically the same: 67.2 inches and 67.1 inces, respectively. Compared thus with Caucasian-Non-Spanish or Negro youths, the Caucasian-Spanish youths and those of "Other Races" are on the average around 2 inches shorter.

Further differences in the mean heights were found within the Spanish group, as shown in Table 3: South-West versus New Jersey and New York. The difference is about 0.6 of an inch in the mean heights of total Spanish youths in South-West, who are primarily of Mexican origin over those of Spanish youths in New Jersey and New York, who are chiefly Puerto Ricans (as previously noted).

Distributions by Height

Obviously, the above-noted marked racial and ethnic differences in the mean heights indicate that there are very significant racial and ethnic differences in the respective distributions by height -- as brought out in Table 4 and in the accompanying graph. These differences in the distribution by height play an important role when height standards are established for certain occupational specialties within the civilian economy and, for that matter, for certain assignments within the military. For instance, a required standard height of 67 inches would eliminate, 19.1 percent of Caucasian-Non-Spanish youths, and 22.1 percent of the Negro youths, as compared with 49.0 percent of the youths of "Other Races" and 47.6 percent of all Spanish youths: 44.7 percent of the Spanish youths in South-West, and 54.5 percent of the Spanish youths in New Jersey and New York (Table 4).

General Remarks

Some additional pertinent demographic and height data are presented in the "Appendices."

The demographic data relate to male youths of Spanish origin or descent within the military age-range, shown by State (Appendix I) and by geographic areas (Appendices II and III), as reported in the 1970 Census of Population.

The height data relate to former years. These former data by race for the United States (Appendices IV-VI) and those of Puerto Ricans in Puerto Rico (Appendices VII-X) clearly corroborate the 1972 findings.

Explanatory Note

The computerized procedure used for classifying the surnames of the examinees as Spanish or Non-Spanish consisted of sorting their names alphabetically and comparing the sorted cases against entries on a file of Spanish surnames, also sorted alphabetically. If an individual's surname appeared in the Spanish surname list, his surname was classified as Spanish.

The list of surnames used here was derived from a list used in the 1970 Census. (Bureau of the Census, 1970 Census General Coding Procedures Manual, Attachment J2.) Certain names were added to the Census list and certain culturally ambiguous names were deleted. (This work was performed with the assistance of Dr. Santiago Rodriguez under a Department of Defense contract with HumRRO. Dr. Rodriguez is on the staff of the Equal Employment Opportunity Commission.)

It should be noted that the Census list contains a number of culturally ambiguous names, e.g. Martín, which are not appropriate for computerized coding where accent marks are not used.

The "Spanish" group that was used in the present report was restricted to cases identified as Caucasian and having a Spanish surname. Except for Negroes, persons having Latin American ancestry are routinely classified as Caucasian at the Armed Forces Examining and Entrance Stations. (A detailed description the Spanish surname recognition procedure is presented in "A Comparison of Computerized Techniques for Recognizing Spanish Names" (In manuscript), G. L. Giesecke, Human Resources Research Organization, Alexandria, Virginia.)

TABLE 1

Male Youths Examined for Military Service, by Age, Race, Specified Ethnic Groups, and Specified Geographic Areas, Fiscal Year 1972*

Age (Years) (as of last birthday)	Distribution by Race, Ethnic Group, and Geographic Areas				
	Caucasian				
	Total	Non-Spanish Surnames	Spanish Surnames	Negro	Other Races
United States: Total					
Total (17-26)	593,091	551,083	42,008	124,951	10,179
17-18	230,287	216,160	14,127	46,689	2,904
19-20	249,750	228,273	21,477	59,719	4,556
21-22	84,358	80,131	4,227	12,404	1,699
23-24	22,505	20,908	1,597	4,574	730
25-26	6,191	5,611	580	1,565	290
South-West					
Total (17-26)	122,384	101,215	21,169	14,791	4,262
17-18	45,717	38,262	7,455	5,354	941
19-20	53,125	42,406	10,719	6,949	1,909
21-22	17,378	15,341	2,037	1,705	918
23-24	4,825	4,126	699	590	373
25-26	1,339	1,080	259	193	121
United States: Remainder					
Total (17-26)	470,707	449,868	20,829	110,160	5,917
17-18	184,570	177,898	6,672	41,335	1,963
19-20	196,625	185,867	10,758	52,770	2,647
21-22	66,980	64,790	2,190	10,699	781
23-24	17,680	16,782	898	3,984	357
25-26	4,852	4,531	321	1,372	169

* The data include preinductees, namely, registrants forwarded by the Selective Service System to the Armed Forces Examining and Entrance Stations (AFEES) for preinduction examination, and applicants for enlistment examined at the AFEES. Both the preinductees and the applicants for enlistment are first time examinees. The examinee's race is recorded on his "Report of Medical Examination" (Standard Form 88) in terms of Caucasian, Negro, and other races. The classification by race was made on that basis. The subclassification of the "Caucasian" by "Non-Spanish" and "Spanish" was accomplished on the basis of surnames. The procedure used for identifying Spanish surnames is briefly discussed in the "Explanatory Note." South-West includes the following states: Arizona, California, Colorado, New Mexico, and Texas.

TABLE 2

Mean Heights of American Male Youths within the Military Age-Range: 17 through 26 Years of Age, by Race and Certain Ethnic Groups in 2-Year Age Intervals:

Fiscal Year 1972 *

Age	Mean Heights in Inches, by Race and Ethnic Group				
	Caucasian			Negro	Other Races
	Total	Non-Spanish	Spanish		
17-18	69.0	69.1	67.3	69.0	67.6
19-20	69.2	69.3	67.2	69.0	67.3
21-22	69.6	69.8	67.4	69.3	67.2
23-24	69.4	69.5	67.1	69.2	66.7
25-26	69.1	69.3	66.9	69.0	66.4
Total (17-26) Weighted by U.S. 1970 Population Census.	69.2	69.4	67.2	69.1	67.1

* Derived from height data of American Male Youths examined for Military Service in Fiscal Year 1972. (See footnotes to Table 1.)

TABLE 3

Mean Heights of American Male Youths of Spanish Origin or Descent within the Military Age-Range: 17 through 26 Years of Age, by Specified Geographic Areas in 2-Year Age Intervals.

Fiscal Year 1972 *

Age	Mean Heights in Inches, by Geographic Area			
	Total	South-West	New Jersey & New York	Remainder
17-18	67.3	67.4	67.0	67.2
19-20	67.2	67.3	67.0	67.0
21-22	67.4	67.6	67.2	67.2
23-24	67.1	67.3	66.5	67.1
25-26	66.9	67.2	66.4	66.7
Total (17-26) Weighted by U.S. 1970 Population Census.	67.2	67.4	66.8	67.0

* See footnote to Table 2. South-West include the following States: Arizona, California, Colorado, New Mexico, and Texas

TABLE 4

Percent Distribution of American Male Youths within the Military Age-Range: 17 through 26 Years of Age, by Specified Height and Lower -- by Race, Certain Ethnic Groups and Certain Geographic Areas

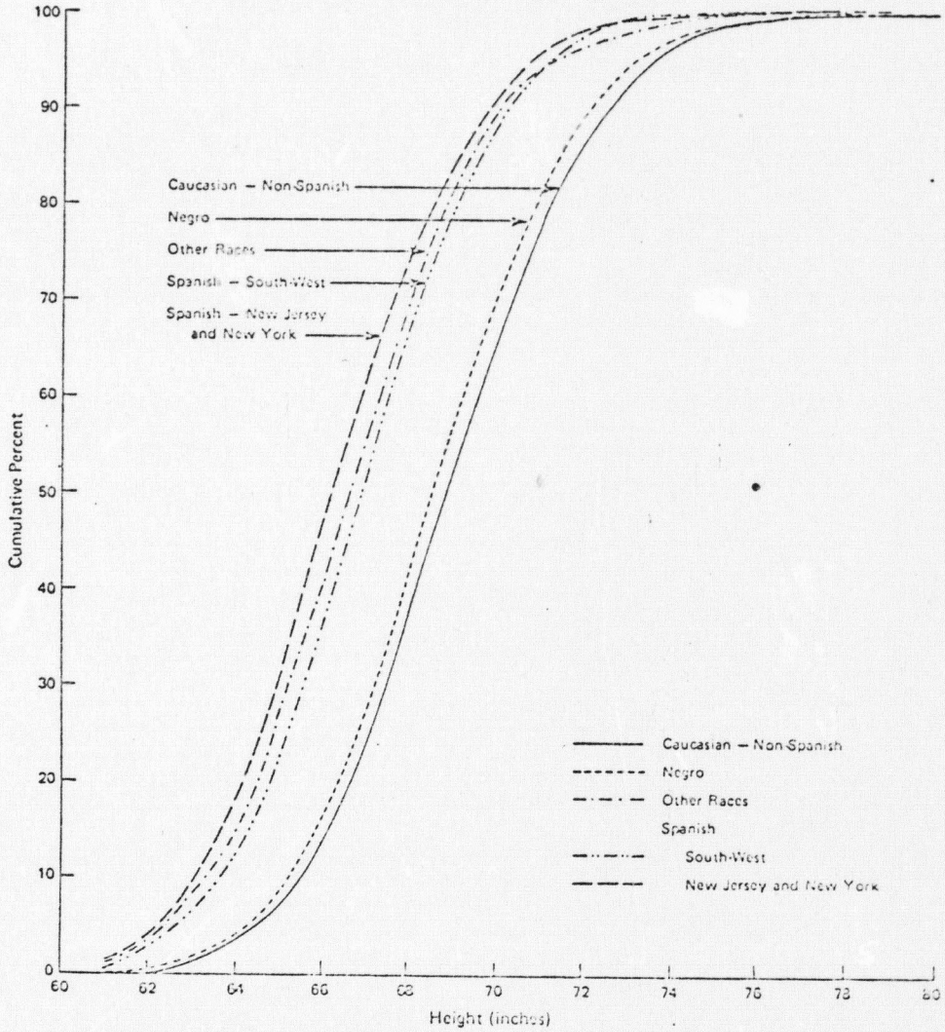
Fiscal Year 1972 *

Specified Height or Lower (Inches)	Percent Distribution by Race, Ethnic Group, and Geographic Area					
	Caucasian - Non-Spanish	Negro	Other Races	Spanish		
				Total	South-West	New Jersey & New York
61	0.0	0.0	1.3	1.0	0.8	1.5
62	0.0	0.8	3.8	2.9	2.8	3.9
63	1.5	2.1	9.0	8.0	6.5	9.8
64	3.5	4.2	15.0	14.9	12.9	19.0
65	7.4	8.8	28.1	26.1	23.1	31.5
66	14.1	16.5	41.2	40.0	37.2	47.3
67	24.1	27.8	56.8	55.2	52.2	61.8
68	38.0	42.0	70.5	69.5	67.1	75.2
69	52.1	56.9	81.5	81.0	79.6	84.5
70	65.5	70.5	90.0	89.1	88.2	91.5
71	77.5	80.9	94.1	94.5	94.0	96.0
72	86.4	89.2	96.1	97.0	98.0	98.0
73	92.9	94.5	98.1	98.4	99.4	98.7
74	96.3	97.0	99.1	99.4	99.8	99.3
75	98.5	98.5	99.6	99.8	99.9	99.6
76	99.2	99.1	99.7	99.9	100.0	99.8
77	99.5	99.6	99.8	100.0	-	99.9
78	99.7	99.8	99.9	-	-	100.0
79	99.9	99.9	100.0	-	-	-
80	100.0	100.0	-	-	-	-

* Distributions derived from height data of American Male Youths examined for Military Service in Fiscal Year 1972, weighted by the distributions of these youths by Race, Ethnic Group, and Geographic Area as reported in the U.S. 1970 Census of Population. (See footnotes to Tables 1-3, and Tables A and B, Appendix)

Percent Distribution of American Male Youths within the Military Age-Range: 17 through 26 Years of Age, by Specified Height and Lower—by Race, Certain Ethnic Groups and Certain Geographic Areas

Fiscal Year 1972



APPENDICES

TABLE A

American Male Youths of Spanish Origin or Descent Within the Military Age Range: 17 through 26, by State and 2-Year Age Intervals
1970 Census *

State	Age Range (17-26), by 2-Year Age Intervals					
	Total	17-18	19-20	21-22	23-24	25-[illegible]
United States: Total	762,708	185,253	157,024	146,450	142,[illegible]	133,[illegible]
Alabama	3,879	841	993	776	645	[illegible]
Alaska	1,099	64	328	398	105	[illegible]
Arizona	21,944	6,542	4,585	3,909	3,[illegible]	3,[illegible]
Arkansas	2,120	634	484	400	338	[illegible]
California	203,481	47,502	42,079	39,296	38,558	36,[illegible]
Colorado	21,024	5,858	3,903	4,086	4,058	3,12[illegible]
Connecticut	5,836	1,215	1,038	1,081	1,185	1,51[illegible]
Delaware	680	89	195	45	141	207
District of Columbia	1,464	180	284	258	201	448
Florida	26,594	6,614	5,809	5,068	4,710	4,395
Georgia	5,253	885	1,192	1,510	918	748
Hawaii	3,127	529	544	897	632	525
Idaho	1,363	253	234	219	263	394
Illinois	33,487	7,594	6,492	6,630	6,250	6,532
Indiana	9,182	2,175	1,912	1,513	2,200	1,382
Iowa	2,076	360	495	342	539	340
Kansas	5,402	1,127	1,000	1,252	1,125	898
Kentucky	4,055	1,107	867	677	824	580
Louisiana	5,669	1,183	1,387	1,293	876	930
Maine	225	21	52	61	68	23
Maryland	4,103	909	695	775	752	972
Massachusetts	6,113	1,117	1,240	1,212	1,018	1,526
Michigan	13,048	3,324	2,449	2,160	2,735	2,362
Minnesota	3,401	816	477	520	849	75[illegible]
Mississippi	1,580	436	371	244	330	199
Missouri	4,785	1,173	1,151	736	849	876
Montana	565	63	177	145	125	37
Nebraska	1,819	570	274	368	326	201
Nevada	1,796	563	358	238	398	4[illegible]
New Hampshire	202	44	33	80	15	30

TABLE A (Continued)

Appendix

State	Age Range (17-26), by 2-Year Age Intervals					
	Total	17-18	19-20	21-22	23-24	25-2
New Jersey	21,462	5,002	3,863	4,025	4,158	4,4
New Mexico	23,895	7,004	4,754	4,547	4,072	3,5
New York	106,526	22,943	20,505	20,091	21,695	21,2
North Carolina	5,578	1,042	1,893	1,035	953	65
North Dakota	271	-	39	39	85	10
Ohio	10,329	2,625	1,890	1,575	2,323	1,91
Oklahoma	4,824	1,073	801	1,200	964	786
Oregon	2,214	516	434	477	268	519
Pennsylvania	8,558	1,613	1,652	1,933	1,879	1,481
Rhode Island	614	45	210	166	88	105
South Carolina	2,324	223	1,128	452	275	246
South Dakota	287	137	17	60	16	57
Tennessee	4,329	672	1,122	884	685	966
Texas	152,781	41,657	32,088	28,465	26,133	24,438
Utah	3,213	867	804	578	534	430
Vermont	205	45	61	62	22	15
Virginia	5,660	821	1,592	1,850	720	677
Washington	6,808	1,475	1,686	1,446	1,259	942
West Virginia	781	339	152	92	134	64
Wisconsin	5,285	1,096	1,025	967	1,212	985
Wyoming	1,394	470	230	317	118	259

* Source: U.S. Bureau of the Census, Census Population: 1970, Detailed Characteristics, PC(1)-D, Tables 152.

Appendix II

TABLE B

American Male Youths of Spanish Origin or Descent Within the Military Age Range: 17 through 26, by Specified Geographic Areas in 2-Year Age Intervals 1970 Census *

Geographic Areas	Age-Range (17-26), in 2-Year Intervals					
	Total	17-18	19-20	21-22	23-24	25-26
United States: Total	762,708	183,253	157,024	146,450	142,463	133,518
South-West	423,123	108,563	87,389	80,303	76,577	70,291
New Jersey & New York	127,988	27,945	24,368	24,116	25,853	25,706
Remainder	211,597	46,745	45,267	42,031	40,033	37,521

* Derived from Table A. South-West includes the following states: Arizona, California, Colorado, New Mexico, and Texas.

Appendix III

TABLE C

Percent Distribution of American Male Youths of Spanish Origin or Descent within the Military Age Range: 17 through 26, by Specified Geographic Areas, in 2-Year Age Intervals 1970 Census *

Geographic Areas	Percent Distribution Age-Range (17-26), in 2-Year Intervals					
	Total	17-18	19-20	21-22	23-24	25-26
United States: Total	100.0	100.0	100.0	100.0	100.0	100.0
South-West	55.5	57.2	55.7	54.8	53.8	52.6
New Jersey & New York	16.8	15.2	15.5	16.5	18.1	19.3
Remainder	27.7	25.6	28.8	28.7	28.1	28.1

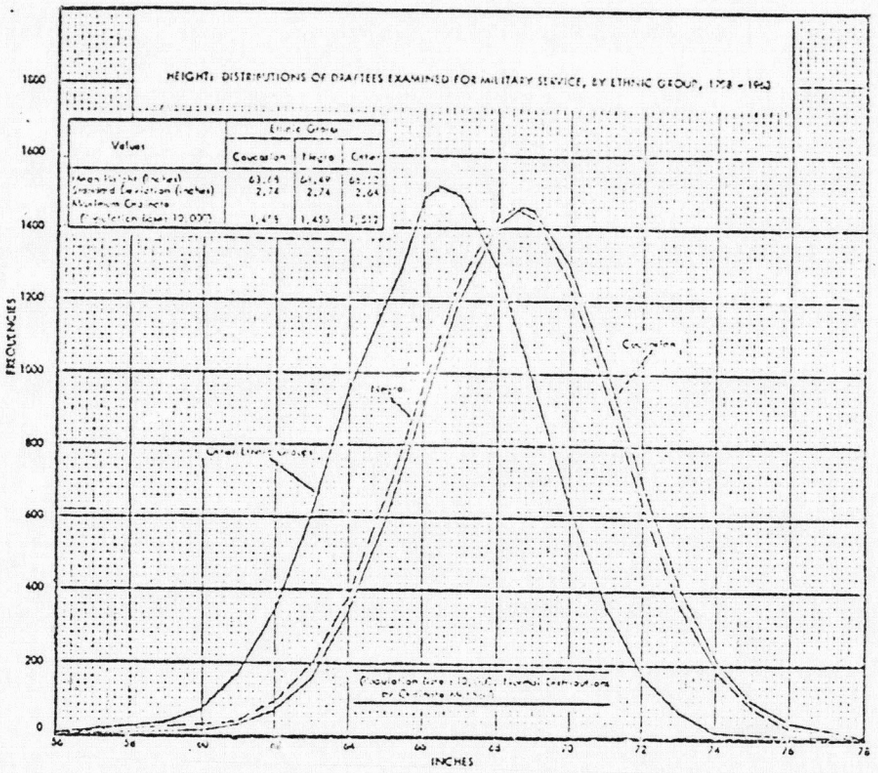
* See footnote to Table B.

TABLE . HEIGHT: DISTRIBUTION OF DRAFTEES EXAMINED FOR MILITARY SERVICE, BY ETHNIC GROUP: 1950-1955 (Population Bases: 10,000)*

Height (Inches --Without Shoes)	Ethnic Group		
	Caucasian	Negro	Other
Total	10,000	10,000	10,000
< 58	1	1	5
58-59	2	2	17
59-60	5	7	45
60-61	17	22	116
61-62	49	57	253
62-63	114	138	465
63-64	249	278	784
64-65	449	515	1,124
65-66	750	793	1,398
66-67	1,074	1,132	1,507
67-68	1,304	1,340	1,409
68-69	1,465	1,468	1,141
69-70	1,366	1,335	802
70-71	1,179	1,124	489
71-72	845	785	258
72-73	561	508	116
73-74	309	273	48
74-75	157	136	17
75-76	68	56	5
76-77	25	21	1
77-78	8	7	-
> 78	3	2	-
Mean Heights	68.68	68.49	68.52
Standard Deviations	2.74	2.74	2.64

*Data confined to United States, excluding Territories. Derived by fitting the data to normal curve, by area method. (See "Appendix: Technical Notes,")

Appendix V



Source: Bernard D. Karpinos (Unpublished data)

DEVIATION (S.D.) OF THE MEANS, BY STATE AND ETHNIC GROUP, [illegible] 1963 *

State	Height in Inches (without Shoes)					
	Total		Caucasian		Negro	
	Mean	S.D.	Mean	S.D.	Mean	S.D.
United States: Total	68.63	2.77	68.68	2.74	68.49	2.74
Alabama	68.81	2.83	69.01	2.61	68.36	3.03
Alaska	68.32	2.99	68.87	2.99	NSD	
Arizona	67.92	2.84	68.11	2.85	68.40	2.66
Arkansas	68.51	2.69	68.66	2.66	68.23	2.69
California	68.72	2.90	68.77	2.86	68.99	2.75
Colorado	68.40	2.95	68.39	2.96	68.90	2.76
Connecticut	68.12	2.84	68.10	2.86	68.45	2.64
Delaware	68.59	2.75	68.82	2.77	67.69	2.65
District of Columbia	68.46	2.83	68.64	2.93	68.30	2.76
Florida	68.53	2.65	68.59	2.68	68.40	2.65
Georgia	68.47	2.63	68.63	2.60	68.22	2.70
Hawaii	66.63	2.32	67.70	2.95	NSD	
Idaho	68.93	2.36	68.93	2.62	NSD	
Illinois	68.81	2.73	68.85	2.72	68.56	2.69
Indiana	68.85	2.64	68.86	2.64	68.68	2.73
Iowa	68.85	[illegible]	68.85	2.64	68.30	2.36
Kansas	69.08		69.11	2.63	68.55	2.83
Kentucky	68.86		68.91	2.71	68.33	2.66
Louisiana	68.33		68.34	2.75	68.41	2.80
Maine	68.14	—	68.14	2.66	NSD	
Maryland	68.61	2.77	68.79	2.76	68.06	2.82
Massachusetts	67.97	2.77	67.96	2.78	68.40	2.88
Michigan	68.50	2.66	68.51	2.66	68.44	2.60
Minnesota	68.77	2.63	68.78	2.60	67.93	2.72
Mississippi	69.03	2.61	69.27	2.55	68.65	2.64
Missouri	68.75	2.63	68.82	2.61	68.23	2.69
Montana	68.93	2.62	68.93	2.62	NSD	
Nebraska	69.15	2.66	69.15	2.69	68.91	2.74
Nevada	69.13	2.62	69.13	2.62	NSD	
New Hampshire	68.44	2.61	68.44	2.61	NSD	
New Jersey	68.16	2.80	68.17	2.80	68.12	2.68
New Mexico	67.54	2.94	67.62	2.98	69.28	3.17
New York	68.44	2.84	68.41	2.85	68.75	2.82
North Carolina	68.92	2.63	69.13	2.54	68.57	2.70
North Dakota	68.79	2.59	68.79	2.59	NSD	
Ohio	68.76	2.74	68.76	2.73	68.75	2.90
Oklahoma	68.96	2.60	69.01	2.60	68.74	2.74
Oregon	69.16	2.63	69.16	2.66	68.74	2.71
Pennsylvania	68.58	2.73	68.60	2.70	68.44	2.76
Rhode Island	68.97	2.96	68.97	2.97	68.80	3.02
South Carolina	68.33	2.62	68.54	2.58	68.16	2.64
South Dakota	68.88	2.60	68.88	2.63	NSD	
Tennessee	68.90	2.60	68.96	2.62	68.64	2.64
Texas	68.66	2.82	68.65	2.90	68.71	2.39
Utah	69.29	2.89	69.29	2.89	NSD	
Vermont	68.16	2.50	68.16	2.58	NSD	
Virginia	68.75	2.73	68.89	2.64	68.45	2.86
Washington	68.98	2.73	68.98	2.74	68.81	2.46
West Virginia	68.25	2.62	68.26	2.60	68.09	2.81
Wisconsin	69.16	2.67	69.16	2.66	69.32	2.49
Wyoming	68.91	2.72	68.91	2.72	NSD	

Source: Bernard D. Karpinos (Unpublished data)

* "Total" includes Caucasian, Negro, and "Other Ethnic Groups." See Table [illegible] for "Other Ethnic Groups." NSD - signifies "Not Sufficient Data" for reliable values.

Appendix [illegible]

Table 3.--CUMULATIVE DISTRIBUTION OF INDUCTEES, 17 THROUGH 26 YEARS OF [illegible] BY HEIGHT, 1960-1962, CONTINENTAL UNITED STATES AND PUERTO RICO*

(BASE: 10,000)

Specified Height or Higher (In Inches)	Continental United States	Puerto Rico
56	-	10,000
57	-	9,997
58	10,000	9,997
59	9,999	9,986
60	9,995	9,948
61	9,984	9,834
62	9,951	9,554
63	9,863	8,980
64	9,663	7,995
65	9,264	6,591
66	8,576	4,920
67	7,548	3,264
68	6,216	1,894
69	4,720	951
70	3,263	409
71	2,030	146
72	1,030	45
73	558	12
74	243	3
75	93	1
76	32	-
77	9	-
78	1	-

*Mean heights and standard deviations: Continental United States--68.02 inches and 2.63 inches; Puerto Rico--65.95 inches and 2.32 inches, respectively. Normal distributions derived by area method.

DEPARTMENT OF THE ARMY
OFFICE OF THE SURGEON GENERAL
MEDICAL STATISTICS AGENCY
28 MAY 1964

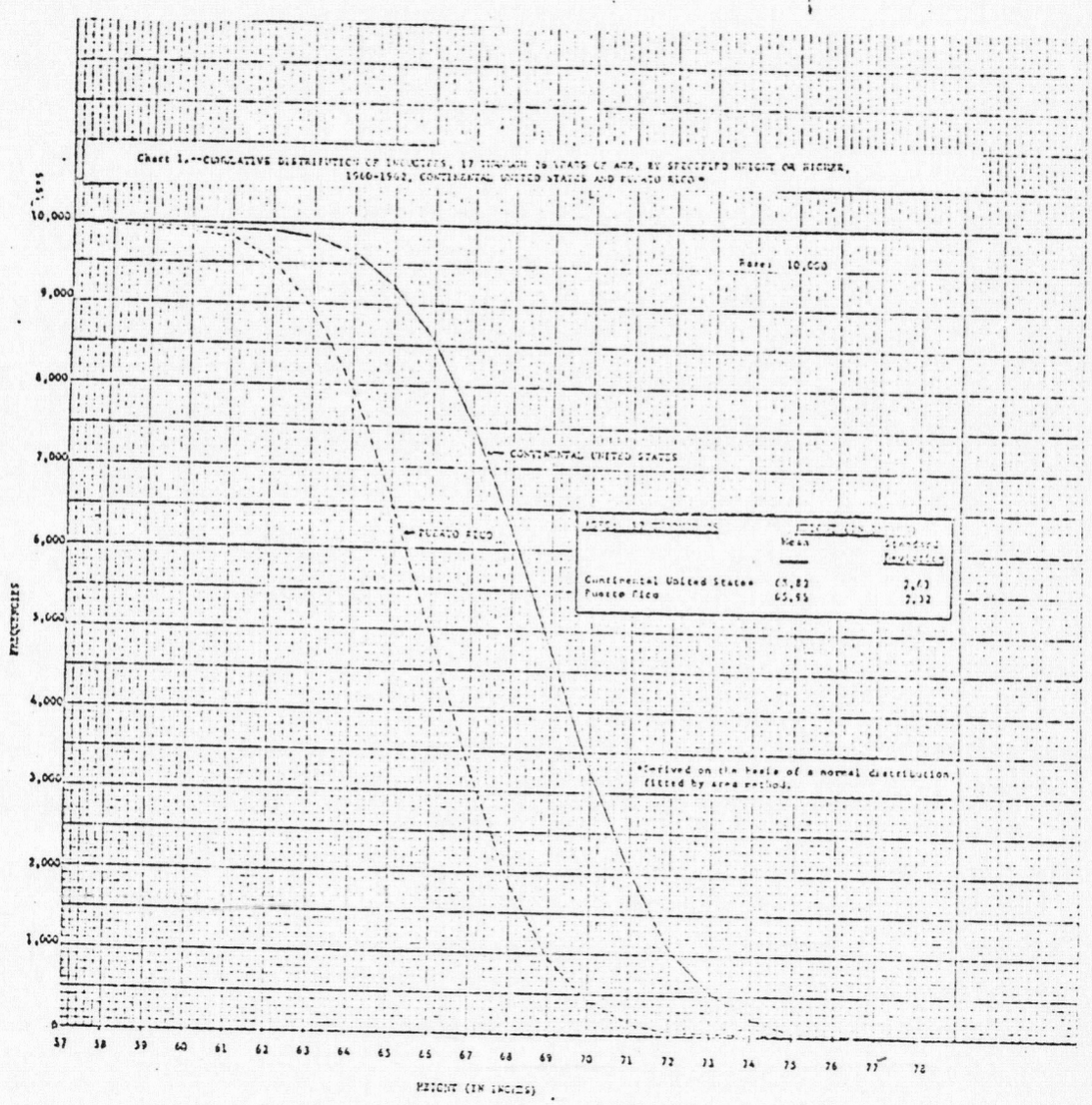


Chart 1.--CUMULATIVE DISTRIBUTION OF INCUMBENTS, 17 THROUGH 26 YEARS OF AGE, BY SPECIFIED HEIGHT OR HIGHER, 1960-1962, CONTINENTAL UNITED STATES AND PUERTO RICO*
Base: 10,000
CONTINENTAL UNITED STATES
PUERTO RICO
Mean
Standard Deviation
Continental United States 67.82 2.73
Puerto Rico 65.95 2.32
*Derived on the basis of a normal distribution, fitted by area method.
FREQUENCIES
HEIGHT (IN INCHES)
10,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78

Table 5.--CUMULATIVE DISTRIBUTION OF INDUCTEES, 19 THROUGH 25 YEARS OF AGE, BY HEIGHT, 1960-1962, CONTINENTAL UNITED STATES AND PUERTO RICO*

(BASE: 10,000)

Specified Height or Higher (In Inches)	Continental United States	Puerto Rico
56	-	10,000
57	-	9,999
58	10,000	9,996
59	9,999	9,984
60	9,996	9,943
61	9,985	9,826
62	9,952	9,545
63	9,864	8,900
64	9,664	8,023
65	9,279	6,664
66	8,599	5,040
67	7,500	3,408
68	6,293	2,032
69	4,801	1,055
70	3,336	484
71	2,119	187
72	1,190	61
73	594	17
74	268	4
75	104	1
76	36	-
77	11	-
78	4	-
79	1	-

*Mean heights and standard deviations: Continental United States--68.87 inches and 2.65 inches; Puerto Rico--66.03 inches and 2.39 inches, respectively. Normal distributions derived by area method.

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1 JUNE 1964

Appendix X

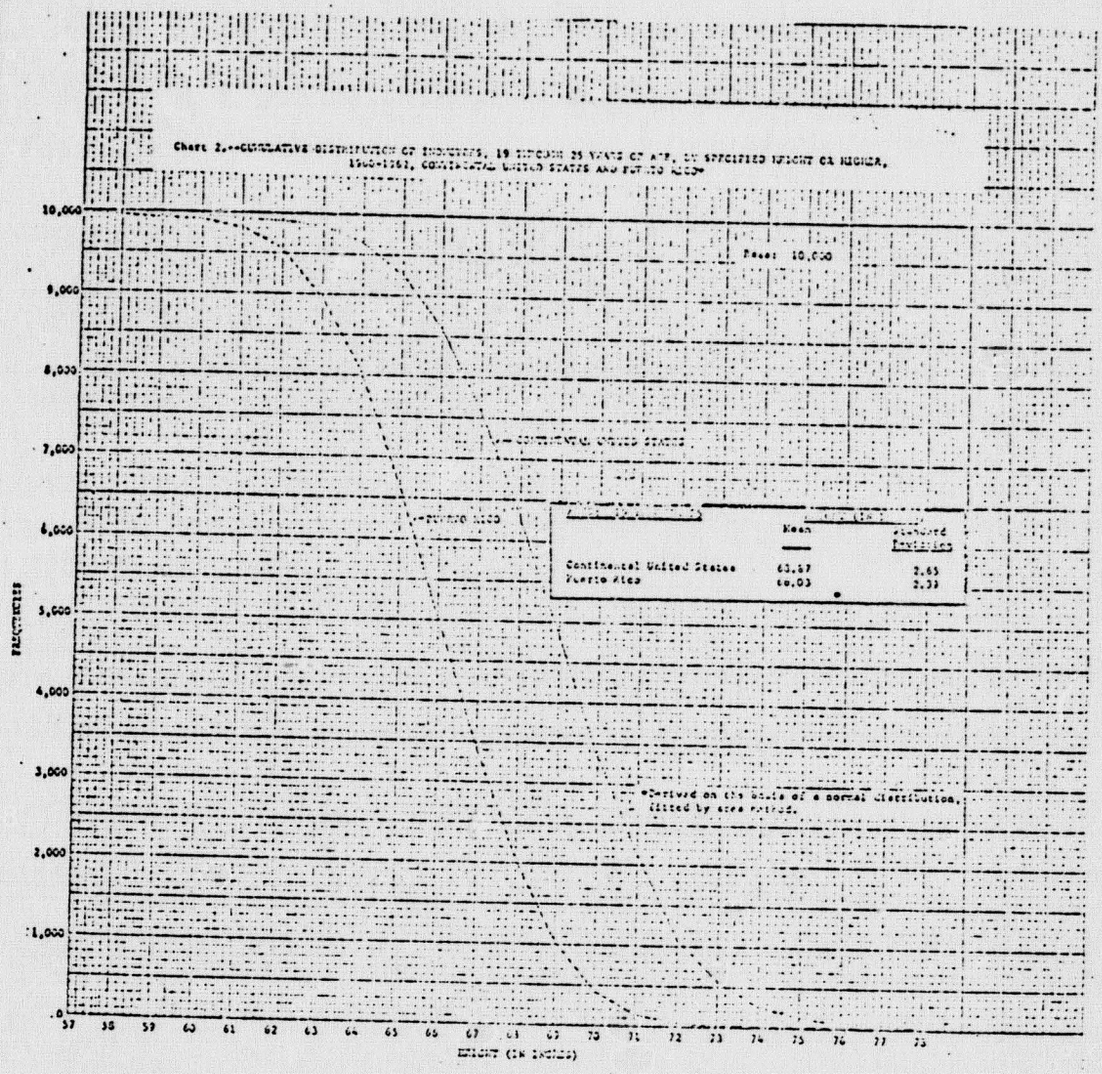

Chart 2.--CUMULATIVE DISTRIBUTION OF ENLISTEES, 19 THROUGH 25 YEARS OF AGE, BY SPECIFIED HEIGHT OR HIGHER, 1960-1961, CONTINENTAL UNITED STATES AND PUERTO RICO*

(Statement delivered in hearing before the Municipal Police Training Council, in the week of December 10, 1973.)

I am Captain Brian F. Lavin, Director of the Equal Employment Opportunity Office of the New York City Police Department. I represent Commissioner Donald F. Cawley who requested that I express his regrets that he could not personally attend these hearings. He designated me to present the position and policy of our Department concerning the matter before this Council.

The minimum height standards which we historically required of Police Officer candidates were considered, in their time, as being consistent with the needs of our department in meeting its responsibility of safeguarding the general public.

No clear statement was ever made as to exactly why any particular height was chosen as the minimum requirement. It is probably fair to assume however, that the minimum had some relationship to the average height of males and females in the general population. A commonly held assumption was that Police Officers should not be much shorter than the average person they encounter on the street or with whom they have official police contact.

When the Law Enforcement Assistance Administration issued its height guideline on March 9th of this year we were well along in our deliberations concerning the requirements we would request the New York City Department of Personnel to establish for candidates taking the next scheduled examination for Police Officer.

Former Police Commissioner Patrick V. Murphy had created the Equal Employment Opportunity Office in January and charged it with

EXHIBIT R

insuring the department's conformity with all existing and emerging Equal Rights legislation and guidelines. One of the first items examined was the Equal Employment Opportunity Commission's, "Guidelines on Discrimination Because of National Origin". Issued in January 1972, it clearly spelled out our responsibility concerning height requirements.

The Law Enforcement Assistance Administration guideline thus only assured us that we were on the right track in closely examining for job relatedness any standard which may have discriminated against otherwise qualified minorities. We realize that minorities, as major victims of crime, have a vital stake in its prevention and control. It is our firm belief that if we do not assure the participation of all segments of the community in the agencies of criminal justice, no truly effective crime control program can be undertaken.

However, if part of the rationale behind the Law Enforcement Assistance Administration guideline is the attraction of more minorities to the police service, we suggest that such a move by itself will not necessarily accomplish that aim. No doubt it will allow some minorities and women to compete, but to seriously attempt to attract more minorities, much more than this needs be done. Exactly how much more, has been shown by our recent successful recruitment drive.

Very soon after we began our research, we discovered the fact that there is an unsettling scarcity of empirical data for either documenting or proving the validity of any height requirement.

The very few studies that have been done on this subject by others have concluded that there is no demonstrable link between the height of a law enforcement officer and his ability to satisfactorily perform the tasks required by the job. Also from the results of those limited studies it was obvious that height was not the most important factor in determining an officer's succeptability to attack.

Of singular significance in any study of the job relatedness of height requirements is that there have not been any significant number of persons in any police agency below height standards similar to our own upon which to base a comparative study of their effectiveness in the job.

We discovered also that there appears to be a clear trend in the court decisions dealing with height requirements as a selection criterion, to first require a showing that the height requirement disproportionately disqualifies members of a protected class. Once such a showing has been made, however, the burden then shifts to the employer to establish the job relatedness of the standard. This Griggs-Castro approach is the same presented by the Law Enforcement Assistance Administration guideline which thus parallels the case law in this area.

The Castro case seemed the most significant in our review. Significant in that the lower court held that the height requirement of the Boston Police Department was not unconstitutional. To quote from Judge Wyzanski's opinion, "It is probable that

while height is not determinative of fitness to be a policeman, any more than it is of fitness to be an athlete or a general, it is significantly related to fitness to be a policeman, as it is not significantly related to being a judge or a scientist".

It would be inaccurate and misleading to suggest that the Court of Appeals in the Castro Case upheld police height requirements as being reasonable. That court ruled that the record was infirm with respect to the fact that the plaintiffs had simply failed to demonstrate the disproportionate impact of the height requirement on the minorities involved. It seems clear then, that had the plaintiffs made the showing of prima facie discriminatory impact, the Court of Appeals would have required the defendant Boston Police Department to justify the minimum height requirement with convincing facts establishing a fit between the qualifications and the job. One distinct fact does emerge from the lower court decision. That being, that no statistics or evidence was cited as the basis for the District Judge's finding of "significant relationship".

This then, as we see it, is the very heart of the matter before us. Any effective challenge to height standards would, of course, require a threshold showing of disproportionate disqualification of a protected class as a trigger to close scrutiny of the requirement. If such a showing were successfully made, and we have reason to suspect that it could be, the burden would then shift to the department to justify the validity of the requirement in terms of job performance. Such justification

could only be sustained through the presentation of the results of height-job performance studies. Inasmuch as those studies have not been conducted in or by New York City in the past, there being no recognized need, we abandoned height requirements entirely for the Police Officer Exam scheduled for this coming Saturday. An Exam in which we anticipate well over 100,000 candidates to participate, and according to preliminary samplings, better than half will be members from the minority communities.

It is our sincere hope that sufficient numbers of male candidates below the former 5'7" standard will be successful in this exam. They will provide us with a population from which major, in depth studies can be undertaken to develop job performance criteria which would take into account all factors of required performance, including the total environment in which an officer is required to perform. From that research, employment standards could be established which could in no way be construed as unfairly discriminatory, and which would be compatible with the needs of effective law enforcement and those of the general public.

When the requirements for this Saturday's Police Officer Exam were announced several months ago, there were outcries in some circles that we were lowering our standards. While concerned with that type of reaction, it remains our contention that our decision to abandon height requirements, in addition to putting us in line with the guidelines and current case law, was made in

the hope that it would enable us to raise our employment standards. The abandonment of a requirement which could not meet a test of job relatedness is in no sense a lowering of standards. Ultimately, if minimum height standards are found to be non-job related, we have the option of setting such requirements as would give us a truer indication that a candidate possesses the skills and abilities necessary to be an effective Police Officer. On the other hand, the decision to abandon height requirement now was not cut in stone. If the data gathered in our research studies indicate that height is a bona fide occupational requirement, we will institute standards consonant with the results of that research. In the end, if our action has the effect of shifting reliance from non-job related selection criteria to criteria which are proven indicators of successful job performance, selection standards will have been raised, not lowered.

Thank you very much.

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[illegible]

[illegible]

[illegible]

287sa

POLICE DEPARTMENT
NEW YORK, N Y 10038

April 9, 1976

Dear Officer:

There is a possibility that this department will be in a position to temporarily rehire a number of former police officers for the two week period between July 5 and July 16, 1976. Such employment would be in conjunction with policing the Democratic National Convention.

Consideration for these limited appointments is being given to laid off members of the service. Those who accept placement will be restored to full police officer status for the two week period. Consequently, your interest is being solicited.

Acceptance or rejection of this employment offer will have no effect upon your position on the preferred list. However, it is important for the department to know at this time whether or not you will accept such an appointment.

Those laid off officers interested in accepting such employment would be required to undergo a medical examination, psychological screening and a supplemental character investigation prior to employment. Orientation and retraining would take place after rehiring.

Therefore, you are asked to indicate your preference on the enclosed postal card and return it prior to April 23, 1976. Failure to respond by that date will be considered a declination of the appointment offered.

Additional information on this matter may be obtained by calling the Employment Division at (212) 374-6817.

Sincerely,

John F. Ronan
Inspector

em
Enc.

EXHIBIT S

The Beame Plan: Slash 380M in Fiscal '77

By MARK LIEBERMAN

Mayor Beame's new budget proposal will slash an estimated $380 million from city spending for the fiscal year beginning July 1 as part of a two-year proposal for budget cuts to eliminate a deficit of $521 million, City Hall sources said yesterday.

[illegible] deliver a [illegible] message to a joint meeting of the Board of Estimate and City Council at City Hall [illegible] and the figures are expected to add further to the anguish [illegible] which New Yorkers have lived since the near-miss of fiscal 1975.

The plan to be outlined by Beame today — one day before it is to be formally submitted to the watchdog Emergency Financial Control Board — delays [illegible] the expected economies [illegible] last year's city budget [illegible].

But the plan for 1977-78 will include:

● The elimination of 6,000 jobs in mayoral agencies, including the Police, Fire and Sanitation departments, with 1,500 layoffs anticipated. The police are expected to lose 300 jobs and the Fire Department up to 100. Beame hopes that most of the jobs can be eliminated through attrition.

● "Substantial" cuts in dollar appropriations to independent agencies such as the Board of Education and Health and Hospitals Corp., although the number of job cuts is not specified in the mayor's proposal. "History has shown that when they apply the dollar cuts, jobs go," one budget official said.

● Slashes of more than $50 million in social programs such as welfare, drug abuse control and mental health services.

The cuts to be outlined by the mayor, sources said, will not follow a percentage formula.

"The agency cuts will range from a fraction of a percentage to more than 30%, with the essential services required to take the smaller cuts.

"The cuts were applied on the basis of the agency's ability to absorb them," an aide to Budget Director Donald Kummerfeld [illegible] stated.

The mayor already has [illegible] that cuts for the 1977-78 fiscal year will include $15 million [illegible] the City University and $50 million based on the city's proposed withdrawal from the federal Social Security system. Albert Shanker, president of the United Federation of Teachers, who met with Beame yesterday at City Hall, said that his union might seek to offset Social Security losses through future collective bargaining.

288 sa

EXHIBIT T

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS, Plaintiffs,	Civil Action No.
-against-	
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department, Defendants.	PLAINTIFFS' INTERROGATORIES AND REQUEST TO PRODUCE DOCUMENTS

Plaintiffs request that defendants answer the following interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure and produce for copying and inspection in the offices of counsel for plaintiffs, Christopher Crowley, One Chase Manhattan Plaza, New York, New York, the following documents requested pursuant to Rule 34 of the Federal Rules of Civil Procedure:

(1) List all New York City Police Department police officers who are presently on duty by name, sex,

EXHIBIT U

seniority, date of appointment, race and ethnicity (blacks, Hispanics and non-Minorities). For each such police officer also list initial application date, the number of the entry level exam upon which they were appointed, the score received on such exam and any and all entry level exams which they took prior to the exam from which they were appointed and the score received on such exams.

2. List all New York City Police Department police officers who were laid off at any time since June, 1975 by name, sex, seniority, date of appointment, race and ethnicity (blacks, Hispanics and non-Minorities). For each such police officer also list initial application date, the number of the entry level exam upon which they were appointed, the score received on such exam and any and all entry level exams which they took prior to the exam from which they were appointed and the score received on such exams.

3. State the date of the next planned or anticipated recall of New York City Police Department police officers and the number of persons expected to be recalled.

4. State the date of the next planned or anticipated layoffs of New York City Police Department police officers and the number of persons expected to be laid off.

(5) State the name, position and agency of the person or persons responsible for validating and reviewing entry level exams of the New York City Police Department and produce any and all documents not previously produced to plaintiffs which relate to the entry level examinations challenged in this action.

(6) State the name, position and agency of the

person or persons responsible for studying the job relationship of the height requirements for the position of New York City Police Department police officer and produce any and all documents which relate to the job relationship of the height requirement to the position of police officer.

Dated: New York, New York
April , 1976

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